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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
NO. 80-5484 Term, 980

HOWARD GREGORY BLUM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether or not the trial court erred in not suppressing the physical evidence found in the duffel bag at the time of the defendant-appellant Blum's arrest where there was no consent to search and a warrant was not obtained?

II. Whether since there was no probable cause to arrest appellant-defendant Blum the evidence flowing from that illegal arrest should be suppressed?

III. Whether Blum was denied due process and effective assistance of counsel by the trial court when the court ruled that neither Blum nor his counsel could hear the reasons for the government not revealing the last known address of Robert Eugene Mercier?

IV. Whether the trial court erred in charging the jury that once an overt act was committed following the conspiratorial agreement, no participant in that agreement could validly withdraw?

V. Whether the evidence is sufficient to sustain the verdict against defendant-appellant Blum as to Count II of the indictment?

PARTIES

All parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case in this Court.

OPINIONS BELOW

The decision of the Court of Appeals for the Third Circuit is not yet reported. It is set out in the appendix, infra, at pages i and ii.

JURISDICTION

On October 29, 1979, the defendant-petitioner, Howard Gregory Blum, was convicted of violating 18 U.S.C. §371 and 18 U.S.C. 924(c), in the District Court for the Western District of Pennsylvania. Defendant was sentenced to prison on November 19, 1979. The Court of Appeals for the Third Circuit entered an order affirming the judgment of the District Court on August 4, 1980. Title 28 U.S.C. §1254(1) confers jurisdiction on this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the following constitutional provisions and statutes are set forth at length in the appendix at pages 90a through 94a.

Amendment 5 United States Constitution .....page 18
Amendment 6 United States Constitution .....page 18
Amendment 4 United States Constitution .....page 11
Amendment 14 United States Constitution.....page 15
18 U.S.C. §371.....page 3
18 U.S.C. §924(c).....page 3
28 U.S.C. §1254(1).....page i and ii

STATEMENT OF THE CASE

HISTORY

On August 14, 1979, defendant-appellant, Howard Gregory Blum, along with certain other named individuals, was indicted at criminal number 79-00138-01 in the United States District Court for the Western District of Pennsylvania. The two count indictment (see p. 82a of the Appendix, hereinafter referred to as "App." filed in the lower court) charged the defendants with violations of 18 U.S.C. §371, (conspiracy), and 18 U.S.C. §924(c) (unlawful possession of a firearm during the commission of a felony). Specifically, count one charged that Blum and his co-defendants conspired to rob an armored car that belonged to a bank whose accounts were insured by the F.D.I.C. (Federal Deposit Insurance Corporation). The second count was merely the unlawful possession of a firearm during the commission of a felony; in this case the conspiracy.

Motions to suppress certain evidence and motions to dismiss the indictment were filed. On October 5, 1979, the district court denied all motions and the case was listed for trial commencing on October 22, 1979.

On October 22, 1979, a jury trial was convened before the Honorable Barron P. McCune, District Judge. On October 29, 1979, the jury returned verdicts of guilty on both counts of the indictment against Blum. On November 19, 1979, Blum was sentenced and committed to the custody of the Attorney General for a period of five (5) years as to count one; as to count two, Blum was committed for a period of three (3) years which time was to be served consecutively with the sentence at count one for a total of eight (8)

years imprisonment. No fine or costs were imposed.

Petitioner Blum's bond was revoked following his conviction on October 29, 1979 by order of District Judge Barron P. McCune.

Petitioner Blum filed a Motion For Release On Bail Pending Appeal From Judgment to the United States Court of Appeals for the third circuit, at No. 79-2700, which Motion was denied on February 21, 1980, per Circuit Judge Max Rosen.

An Application For Bail pending appeal was presented to Mr. Justice Brennan of this Court at No. A-821. This application was denied on March 25, 1980.

Blum filed a Notice of Appeal to the United States Court of Appeals for the third circuit at No. 79-2701. On August 4, 1980 the Court of Appeals entered a judgment order, which affirmed the judgment of the District Court.

Petitioner Blum then filed this appeal which is now before this Court.

FACTS

A suppression hearing was held on October 5, 1979 at which time Blum moved to suppress the items seized without warrant and without the consent from a duffel bag that was found in the back of a stolen car near the scene of Machi's arrest. In addition, he argued inter-alia, that there was no probable cause to arrest him and therefore the only other evidence linking him to the alleged crime, to-wit; the gloves that were found on his person, should be suppressed at the time of trial.

At the hearing on the suppression motion, the government agent who made the arrest testified as to his knowledge at the time of the arrest in support of the government's position that he had probable cause to make the arrest. The facts as developed at the suppression hearing were as follows:

On July 19, 1979, Agent Pedreira received information, second hand, from an informant whom he did not know and had never dealt with before that a robbery of a Cauley's armored car was being planned by two men, both of the Youngstown, Ohio area, and a Pete whose last name was unknown and a gentleman named "Mac", both of whom were from the Pittsburgh area. The informant also informed that "Pete" had a 1976 GMAC van and the license number of the van was given. Agent Pedriera checked with the Bureau of Motor Vehicles and found that the license number belonged to a vehicle registered to a Peter Machi. Agent Pedriera was also advised by that same source that the car that was to be robbed was the Cauley armored car that made a daily run between Butler and Pittsburgh, and that the robbery was planned for a Tuesday.

On July 23, 1979, the same source advised that it would be car number 12 and that the place of the robbery would be the Valencia Lounge on Route 8 which is a major

highway connecting Butler and Pittsburgh.

The informant also said that the car would be robbed while the driver and guard were in the Valencia Lounge. The informant said that there would be a few trial runs first (App. 1a, 2a, 3a). Agent Pedreira checked with Cauley's president and found that car number 12 carried large sums of money on Tuesday and car number 12 was always used on the Butler run. This car was generally left outside the Cauley's garage in Sharpsburg, Pennsylvania at night. Later on July 23, 1979 the informant told Agent Pedreira through another agent that four men were going to go to Cauley's that night in an attempt to make a key to fit the armored car (App. 4a). Agent Pedreira asked Cauley's president to put number 12 inside that night and the agent began surveillance at Cauley's garage. They observed the van registered to Peter Machi go by Cauley's. Although the agent could see individuals in the van, he could not identify them as being any of the defendants. (App. 5a).

On July 24, 1979, a Tuesday, the FBI conducted a surveillance on car number 12. Machi's van was seen on Route 19, which runs parallel with Route 8 near Kaufmann's which is one of the stops made by car number 12. The van was seen later at Uncle Charlie's Restaurant on Route 8, which is about a half mile from the Valencia Lounge. At a later time that day, the armored car number 12 pulled into the parking area of the Valencia Lounge and Machi's vehicle was there. Eckman was observed in the lounge on the day while the Cauley guards were having their lunch in the lounge. The informant told the FBI later that day that the run was deemed satisfactory by the people involved and that another dry run would take place the following Tuesday, July 31, 1979. The informant also told Pedreira that the keys to car number 12 had been obtained and that the plan was set to go into action, but first the plan required that two trucks or vans had to be stolen for use in the robbery (App. 6a, 7a).

On July 31, 1979, the Machi vehicle, driven by Machi and accompanied by Mac, was seen at Uncle Charlie's. A short time later, Eckman arrived and got into Machi's van with Machi and Mac. They then drove their vehicles to the Valencia Lounge where Eckman and Machi went into the Lounge at different times and sat at the bar but did not acknowledge each other's presence. Mac remained in the van.

Cauley's truck arrived and the guard went inside. After finishing his victuals, Machi left; then Eckman left. The informant told the FBI within the next few days that the robbery was planned definitely for August 7, 1979. On August 6, 1979, the informant divulged that the men had stolen two cars from German Motors, Inc., in Latrobe, Pennsylvania; a 1979 Ford Bronco and a 1979 Ford Econoline Van. Agent Pedreira checked with German Motors and found that two such vehicles were missing (App. 8a). On August 7, 1979 the agents observed the armored car pull into the Valencia Lounge Parking lot. Then a vehicle driven by Peter Machi, registered to Machi's niece, arrived in the Valencia parking lot. A short time later, a 1979 Bronco that fit the description given by the informant and verified by German Motors, Inc., arrived at the Valencia Lounge parking lot driven by Eckman. Machi parked his niece's car and entered the Bronco which then exited the Valencia parking lot (App. 9a, 10a). The agents then, a short time later, saw a Ford Econoline van, which fit the description given by German Motors as the stolen vehicle, pass the lounge and park in Uncle Charlie's Restaurant parking lot. All four defendants were seen at Uncle Charlie's parking lot at that time. The Ford Bronco returned to the Valencia parking lot with Eckman and Blum and drove through the parking lot and then exited. A short time later Eckman and Machi in the Ford Bronco returned to the Valencia Lounge parking lot where Machi got into his niece's car, and Eckman and he driving their respective vehicles left the Valencia Lounge parking area and drove to

Uncle Charlie's parking lot. The agents then said that the decision was made to arrest all defendants (App. 11a, 12a).

The defendant's were arrested while standing together at Uncle Charlie's parking lot. The vehicles were seized at that time and after having obtained permission from German Motors, the agents searched the two stolen vehicles. In the Ford Econoline van, the agents found a duffel bag. Without obtaining a warrant or checking with German Motors to ascertain if the bag had been stolen or belonged to that company or to one of its employees, the agents searched the bag. No consent was obtained from any defendant to search the bag. In the bag the agents found various guns, masks, amunition and walkie-talkies, and a police scanner which could be used to monitor police calls. All this evidence was introduced against all the defendants at the trial. The guns that were found in the bag were the subject of Count Two of the indictment on which defendant Blum was given consecutive time to his conviction for conspiracy. Blum specifically argued following the hearing on the suppression motion that the seizure of the contents of the duffel bag without a warrant violated the rules laid down by the Supreme Court.

On cross examination of Agent Pefreira he admitted that neither he nor any other member of the FBI, at any time, saw Mr. Blum prior to arrest on August 7, 1979 at Uncle Charlie's parking lot (App. 83a, 84a, 85a, 86a, 87a, 88a). This was despite the fact that they had been receiving "reliable information" since the 19th of July which information stated that Mr. Blum would be with three (3) other defendants conducting various dry runs at various times and securing other paraphernalia to use in the alleged robbery of Cauley's armored car number 12.

Moreover, Agent Pedreira stated that all of the information concerning the activities of all defendants, including Mr. Blu, which information was relied upon to

supply the probable cause for the arrest, was contained in the five page Complaint filed in this case. Agent Pedreira was the affiant of said complaint and it was executed by him on August 7, 1979.

At the trial McCarthy was the main witness for the government and testified that all four men had been involved in the conspiracy to rob the armored car. He also testified that the scheme or plan to rob the armored car was originated by he and Peter Machi. Moreover, he didn't meet Blum until July. Further, that he met Blum at the same time he met Gene Mercier (App. 13a).

McCarthy also testified that all four decided that the robbery of the armored car could not take place that day, and that it would have to be postponed until the following week (App. 14a). They then decided to get into their respective vehicles and leave. (App. 15a) On cross-examination, McCarthy admitted that it was decided they weren't going to do the robbery that day and never discussed any future plans about a subsequent robbery. But, under specific questioning about what was said when all four men were together in the van going from the Valencia Lounge to Uncle Charlie's parking lot, the witness stated that all the persons involved agreed that they couldn't do the robbery, and when they got to Uncle Charlie's Parking lot and got outside, they all said well, let's get out of here (App. 16a).

At trial, Special Agent Robert Joseph Cudone testified that while on surveillance at the Cauley Armored Car Company's garage, he saw the Machi van and recognized in the van a person named Robert Eugene Mercier (App. 17a). Following the denial of motions for judgment of acquittal and before the defendants opened their case, Blum through his attorney requested that the government turn over to him the address of Mr. Robert Eugene Mercier on the ground that Mr. Mercier would be able to supply exculpatory evidence for his client insofar as entrapment defense were concerned

(App. 18a, 19a). The court ruled that the government would have to produce the address of Mr. Mercier. The court told the Assistant United States Attorney that unless the court was informed that Gene had to be protected for security reasons, that the government would have to give Mr. Mercier's last known address so that he could be subpoenaed as a witness for the defense. All other defendants then joined in the motion. At that point, the government stated that it would give the reasons for not giving the last known address of Mr. Mercier to the defendant's counsel "in camera". Blum specifically objected to this procedure of the government giving its arguments for the non-disclosure out of the presence of defendants' counsel, (App. 20a) and the court overruled these objections and the trial judge and the government attorney retired to the judge's chambers where a transcript was made, sealed, and filed with the clerk (App. 21a). Counsel for the defendant Blum, of course, has never been able to see a transcript of the "in camera" colloquoy between the court and the government. The court ruled that the motion for the address of Gene was denied based upon the representation of the United States Attorney (App. 22a).

Throughout the presentation of the government's case each and every FBI agent was asked by counsel for Blum whether or not they had ever seen Blum on any occasion prior to the date of the arrest on August 7, 1979. Each and every agent testified that they had never seen Blum at any time prior to August 7, 1979. See the following pages (App. 23a - 30a) Howard Blum did not take the stand.

Counsel submitted the points for charge, relating, inter-alia, to withdrawal of abandonment of the conspiracy, but the Court ruled that the poont would not be read because the court did not believe it as an accurate statement of the law (App. 31a). The Court then charged that jury that a conspirator may only legally withdraw from the conspiracy before an overt act is committed, but once an overt act is

committed, he cannot then withdraw (App. 32a). In addition to making a motion for judgment of acquittal at the conclusion of the government's case, Blum renewed his motion for judgment of acquittal based on all the evidence (App. 33a). Blum also renewed his motion that the government turn over to the defense attorney the address of Robert Eugene Mercier, which the court denied. Counsel for Blum argued that if the jury found that on August 7, 1979 just before the arrest that all people involved in the conspiracy had decided to abandon it, then the jury was obligated to find Blum not guilty (App. 34a).

Following the trial judge's charge, Blum took exception to the denial of his point for charge regarding the withdrawal of abandonment of the conspiracy, as well as the failure of the government to provide the address of Robert Eugene Mercier and the refusal to give the absent witness charge (App. 35a).

ARGUMENT I

THE TRIAL COURT ERRED IN NOT SUPPRESSING THE PHYSICAL EVIDENCE FOUND IN THE DUFFEL BAG AT THE TIME OF THE DEFENDANT-APPELLANT BLUM'S ARREST WHERE THERE WAS NO CONSENT TO SEARCH AND A WARRANT WAS NOT OBTAINED.

Blum submits that the search of the duffel bag, which was taken from the Ford Econoline van without the consent or the obtaining of a warrant violated his rights under the Fourth Amendment.

Blum concedes that the agents had the right to seize the stolen van. But once the bag was in the custody of the agents and the defendants were safely in custody, the agents were required to obtain a warrant before opening the duffel bag. See Arkansas v. Sanders U.S. 61 L. Ed 2d 235, 99 S. Ct. (179), decided June 20, 1979; Chadwick v. United States, 433 U.S., 97 S. Ct. 2476, 1977; United States c. Milhollan 599 F. 2d 518 (1979).

In Sanders, supra, the court had occasion to deal with the problem of an unlocked suitcase in the trunk of a cab. The court said at page five (5) of its opinion: "In

the ordinary case, therefore, a search of private property must be both reasonable and performed pursuant to a properly issued search warrant. The mere reasonableness of a search assessed in the light of the surrounding circumstances, is not a substitute for the jduicial warrant required under the Fourth Amendment". The court noted further that a few "jealously and carefully drawn" exceptions provided for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate".

Here there are not exigent circumstances, nor any of the exceptions that would relieve the agents from the burden of obtaining a warrant. Defendants were all under arrest, and the vehicles and their contents carefully secured. The best evidence of this is the fact that the agents did secure consent of the owners of the vehicles, German Motors, to search the vehicles, but there was no evidence that German Motors reported the theft of a duffel bag or that the agents had any reason to believe that the duffel bag belonged to anyone other than the defendants jointly, including Blum. Furthermore, the agents were in constant communiciation with the United States Attorney's office as Agent Pedreira testified, and it would have been little difficulty in seeking to obtain a warrant.

In Arkansas v. Sanders, supra, the state argued that the warrantless search of respondent's suitcase was proper, not because the property search was luggage, but rather because it was taken from an automobile lawfully stopped and searched on the street. The court said in answer to this at page 9 stated: "In effect, the state would have us extend Carroll to allow warrantless searches of everything found within an automobile, as well as of the vehicle itself". The court rejected the state's arguments by saying: "Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by

the place from which it was taken. Accordingly, as a general rule, there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places". The court went on to say: "Similarly, a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is association with luggage taken from other locations".

The court notes in footnote 13 in Sanders, however, that not all containers or packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment. The examples the court gives are a kit of burglary tools or a gun case which, by their very nature, cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. In the instant case, there was nothing that could be gathered from the outward appearance of the zippered duffel bag, as indicative of containing anything of the natures given by the Supreme Court in their examples.

In conclusion, the court in Arkansas v. Sanders, said: "Whereas in the present case the police, without endangering themselves or risking loss of the evidence, lawfully had detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected."

Blum, therefore, asserts that because of the government's charge, he has a reasonable expectation of privacy in the personal luggage found in the van, and that the agents were required to obtain a search warrant before searching the duffel bag. Blum would, therefore, submit that under Arkansas v. Saunders, supra, it was not relevant that the vehicle from which the luggage was stolen so long as the person has a reasonable expectation of privacy in the luggage, i.e., the zippered duffel bag. It is expected that the government may raise the question of Blum's standing to

object to the search of the duffel bag.

In Rakas v. Illinois, 99 S.Ct. 421 (decided December 5, 1978), the Supereme Court in that case stated that the question to be asked is: Does the defendant have a legitimate expectation of privacy in the place or things searched?

The court noted, however, that Jones v. United States, 362 U.S. 257 (1960) established the rule of "automatic" standing to contest an alleged illegal search where the same possession needed to establish standing is an essential element of the offense noted. The court in its opinion in Rakas states in a footnote, "We have not yet had occasion to decide whether the automatic standing rule of Jones survives our decision in Simmons v. United States, 390 U.S. 377 (1968).

It is, therefore, Blum's position that until Jones v. United States, supra, is overruled, that Blum has standing because he has been charged with a possessory crime, i.e., the possession of the firearms.

Blum, therefore, submits that the trial court erred in not suppressing the evidence taken from the duffel bag in violation of the Fourth Amendment.

ARGUMENT II

SINCE THERE WAS NO PROBABLE CAUSE TO ARREST APPELLANT-DEFENDANT BLUM THE EVIDENCE FLOWING FROM THAT ILLEGAL ARREST SHOULD BE SUPPRESSED

The defendant Blum was arrested without any warrant and without any probable cause, and without reasonable suspicion that he was at that time, or at any time, involved in the perpetration of any crime or of any criminal activity, but merely because he happened to be in a place where there were at the time of their arrest others who were suspected of some criminal activity.

Agent Pedriera testified both at the suppression hearing (App. 36a - 42a) and again at the trial that the arrest of Blum and the other defendants was warrantless, but nevertheless proper, because he had probable cause to suspect that Blum was or had been involved in criminal activity. He further tells us that all of the facts he relied upon were contained in the Complaint which was filed in the instant case. Said Complaint was dated August 7, 1979, the day of thearrest, and was sworn to by Agent Pedriera. Said Complaint (App. 81a) if read closely will show that no probable cause existed to arrest Howard Blum and therefore the gloves found on or near his person should not have been permitted into evidence but should have been suppressed.

In addition to the above Complaint Agent Pedriera testified that he received reliable information that Howard Blum along with the other three defendants would between July 19, 1979 and August 7, 1979 meet to discuss plans and check the route and habits of the driver of Cauley armored car number 12. However at no time did Agent Pedriera or any of the twenty (20) FBI agents ever see Mr. Blum during any surveillance they performed and accordingly that "reliable information" as to Mr. Blum was clearly unreliable. In fact, Mr. Blum's name is only mentioned in one sentence of the last paragraph of the last page of the Complaint where Agent Pedriera swears as follows:

> "...upon arrival at the parking lot of Uncle Charlie's Restaurant, James Donald Eckman, Peter J. Machi, Adean Charles McCarthy, and an individual later identified as Howard Gregory Blum were observed to meet in the immediate vicinity of the white Econoline van, the 1979 Bronco, and the 1965 Ford. Upon the arrival of the Agents of the Federal Bureau of Investigation, they announced their identity, at which time the above individuals were told they were under arrest."

It is apparent that Blum was never seen before because Agent Pedriera and his assistants don't recognize Blum and Pedriera himself states as follows: an "individual later identified as Howard Gregory Blum..." when identifying him.

When considering all of the information available to Agent Pedriera and the FBI it is clear that there was no probable cause to arrest Mr. Blum and therefore the evidence seized from him at that time, namely a pair of brown gloves, should be suppressed.

It is clear that Blum's Fourth Amendment rights were violated. See Aguilar v. Texas, 378 U.S. 108, 12 L.Ed 2d 723, 84 S.Ct. 1509 (1964) and Spinelli v. United States, 393 U.S. 410, 21 L. Ed 2d 637, 89 S.Ct. 584 (1969).

Blum, therefore, submits that the trial court erred in not suppressing the evidence taken from Blum's person in violation of the Fourth Amendment.

ARGUMENT III

BLUM WAS DENIED DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL BY THE TRIAL COURT WHEN THE COURT RULED THAT NEITHER BLUM NOR HIS COUNSEL COULD HEAR THE REASONS FOR THE GOVERNMENT NOT REVEALING THE LAST KNOWN ADDRESS OF ROBERT EUGENE MERCIER

Before trial, appellant-defendant Blum filed a motion for a Bill of Particulars requesting, inter-alia, any information which the government has which would tend to exculpate Blum. In addition, Blum filed a motion for Discovery to obtain the name and address of any unindicted co-conspirators or informer. As to the first motion the government advised that all exculpatory information was turned over to the defendants. As to the latter motion, it was denied both during the suppression hearing, where neither his name nor any information about him was permitted to be given; and during the trial. However, apparently by accident the name Robert Eugene Mercier was testified to by Special Agent Robert Joseph Cudone as accompanying the defendants during one of the surveillances. Thereafter, Blum through his attorney requested that since the informer was now identified and moreover, his testimony would tend to exculpate Blum, that his address be provided to Blum so he could be subpoenaed to testify on Blum's behalf. It was further

argued by Blum that since this witness was, according to the Government, not in their custody, there was no apparent reason to further protect him particularly in view of the compelling reasons cited by Blum as to why this witness was necessary to his defense (App. 43a).

The trial court ruled nevertheless, over objection, that the government could tell the trial court out of the presence of Blum's attorney and Blum why the government would not reveal Mercier's whereabouts, or at least his last known address.

It is submitted that once the identity of an informer or a key witness has been disclosed to those who would have cause to resent the communiciation, the privilege against disclosure of confidential communications is no longer applicable. See Roviaro v. United States, 353 U.S. 53 (1957).

In Roviaro, supra, the Petitioner contended, at p. 626, as Blum does here, "that the trial court erred in upholding the right of the Government to withold the identity of John Doe. He argues that Doe was an active participant in the illegal activity charged and that, therefore, the government could not withhold his identity or his whereabouts".

In the instant case it is argued that once the man named Gene was identified as Robert Eugene Mercier and as having been placed with defendant Blum during the pendency of this conspiracy that any privilege the Government may have had to withold his whereabouts was waived. Similarly, the court discussed this issue in Roviaro, supra, at pages 627 and 628 where it stated:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. Scher v. United States, 305 U.S. 251, 254, 59 S. Ct. 174, 176, 83 L.Ed. 151; In re Quarles and Butler, 158 U.S. 532, 15 S. Ct. 959, 39 L. Ed. 1080; Vogel v. Gruaz, 110 U.S. 311, 316, 4 S. Ct. 12, 14, 28, L.Ed. 158. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes

the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the government withholds the information, dismiss the action."

The Court in Roviaro, supra went on to say that in

"three recent cases in the courts of appeals have involved the identical problem raised her - the government's rightto withhold the identity of an informer who helped to set up the commission of the crime and who was present at its occurrence. Portomene v. United States, 5 Cir., 221 F.2d 582' United States v. Conforti, 7 Cir., 200 F.2d 365; Sorrentino v. United States, 9 Cir., 163 F. 2d 627. In each case it was stated that the identity of such an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense".

The government maintained that Mercier was not in its custody; but yet maintained it would not state the reasons for non-disclosure in the presence of Blum or his counsel. It is submitted that Mercier may well have been able to give exculpatory information regarding Blum. It should be noted as previously mentioned that only McCarthy placed Blum in the conspiracy prior to the day of arrest. It is also noteworthy that McCarthy's testimony concerning Blum was never corroborated by any of the over twenty (20) FBI agents who had received confidential information more than three (3) weeks prior to their arrest, which information they acted on by conducting surveillance of almost all activities performed by the defendant in preparation of this robbery yet not one time was Blum ever seen.

Therefore, unless appellant-defendant Blum waived his constitutional right not to take the stand in his own defense, Robert Eugene Mercier was his one material witness.

His testimony might have disclosed an entrapment and contradicted the testimony of McCarthy as to Blum's participation in this scheme prior to the arrest.

Lastly, the "In Camera" hearing deprived Blum of a fair trial because counsel could not be effective if he could not hear the government's reasons for non-disclosure and thus did not have an opportunity to rebutt them. Therefore, not only was Blum's rights under the Fifth Amendment violated in that he was not given due process during the trial of his case, but that he was also deprived of the effective assistance of counsel under the Sixth Amendment. If counsel is to be effective he must be present at all critical stages of the proceedings. Here, Blum was denied that assistance.

Therefore, Blum submits that the denial by the government of a material witness to the defendants or at least access thereto resulted in a denial of due process for Blum, and therefore requests that this court, after reviewing the decision of the court below and upholding the government's position either order dismissal of the indictment if they find that the government willfully witheld the name of a material witness that could have been exculpatory to Blum or grant Blum a new trial.

ARGUMENT IV

THE TRIAL COURT ERRED IN CHARGING THE JURY THAT ONCE AN OVERT ACT WAS COMMITTED FOLLOWING THE CONSPIRATORIAL AGREEMENT, NO PARTICIPANT IN THAT AGREEMENT COULD VALIDLY WITHDRAW.

It was Blum's position during the trial of the case and a position that he argued through his counsel to the jury that the conspiracy had terminated and had been abandoned and that all involved had withdrawn (App. 44a, 45a) [1st part of argument[. Blum had submitted a point for charge on this point (App. 46a, 31a). The trial court rejected the point on the ground that it was an incorrect statement of the law. The trial judge then charged the jury on the subject of withdrawal as follows:

> Of course, one can withdraw from a conspiracy and if he withdraws, he is not guilty of a conspiracy. One may withdraw in many ways. He may withdraw by telling law enforcement authorities of his withdrawal and by telling all of his conspirators of his decision to withdraw or he may withdraw by conduct which shows that he has withdrawn from the conspiracy, therefore if you find that any of the conspirators withdrew from this conspiracy before it was fully formed and before it - at least one of these overt acts were committed - you would not, of course, convict him of any conspiracy whatsoever because he could have withdrawn.

Blum's counsel specifically objected to the court's charge on the withdrawal or abandoment of a conspiracy (App. 47a). Counsel submits that this is not the law on the withdrawal of a conspiracy. See U.S. v. Dorn561 F. 2d 1252 (1977); U.S. v. Mardian 546 F.2d 973 (Dec. 12th 1972); U.S. v. Burislli, 336 F. 2d 376 (2nd Cir. 1964); U.S. v. Pearson 508 F. 2d 595 (5th 1975); see also U.S. v. Gypsum 550 F. 2d 115 (1977) where the supreme court did not suggest that the withdrawal could only come before the overt act.

These cases thus illustrate that the judge's charge was erroneous and inasmuch as Blum argued that the conspiracy had been abandoned after an overt act was committed, this charge deprived Blum of a fair trial and was extremely prejudicial to his position. Blum, therefore, requests that this Court grant him a new trial.

ARGUMENT V

THE EVIDENCE IS NOT SUFFICIENT TO SUSTAIN THE VERDICT AGAINST DEFENDANT-APPELLANT BLUM AS TO COUNT II OF THE INDICTMENT.

Defendant-appellant Blum contends that the government fialed to prove the specific allegations recited in Count II of that indictment and that the evidence presented, even when viewed in a light most favorable to the government, United States v. Armocida, 515 F. 2d 29, 46 (3rd Cir., 1975), is not sufficient to sustain the verdict against him. It is axiomatic ". . . (t)he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". In Re Winship, 397 U.S. 358, 364, 90

S.Ct. 1068, 1073 (1970). Here, it is Blum's position that he was convicted of a crime alleged in the indictment, to-wit; unlawful possession of a firearm during the commission of a felony without proof of each fact necessary to constitute that particular offense.

The government states and correctly so (App. 48a - 52a) that in order to prove that Blum was guilty of unlawful possession of a firearm during the commission of a felony it must prove not only the carrying of a weapon during the commission of a felony, but, also that carrying it was also unlawful seperate and apart from its use in the felony. To prove unlawfulness in this particular case the government had three witnesses, Jean Golden, Norman B. Nieder and Raymond J. LItzenberger testify. App. 53a - 67a) Jean Golden indicated that Mr. Blum had not been issued a license to carry a firearm in the city of Pittsburgh; Norman B. Nieder stated that no license was issued to Blum in Allegheny County. Lastly, Mr. Litzenberger testified that no license had been issued in Harrisburg. It is the government's contention that this testimony conclusively shows that Blum was not licensed in Pennsylvania to carry a firearm and, accordingly, prove the first part of the crime, namely, unlawfullness. It is Blum's contention that the government did not prove he was not issued a license in Pennsylvania to carry a firearm because Litzenberger admitted that his search of the indicies in Harrisburg was defective as to Blum. He stated that the pertinent information to be fed into the computer, namely the birthdate, was incorrect.

Mr. Litzenberger, who is employed by the Pennsylvania State Police as a trooper and assigned to the Reocrds and Identification Division as a unit supervisor in firearms, testified that his office (App. 54a) receives all the records of sale of firearms sold in the Commonwealth and all copies of the license to carry firearms and the provisional firearm registration. He stated that pursuant to a request from the

United States Attorney's office he checked the reocrds to see if Blum as well as the other defendants were licensed to carry a firearm. He opined that the records showed that no license to carry a gun was ever issued to Howard Blum. Furthermore the government introduced and admitted into evidence Government Exhibit #62 which was a sealed document with the name Howard Blum on it. That document purported to be an information certificate indicating that Howard Blum was not licensed to carry a firearm. Basically the document is boiler-plate, it is a printed form with the exception of a place for one's name, social security number, age, and date of birth. The information placed on that sealed document by Mr. Litzenberger was materially inaccurate and therefore, did not prove that Howard Blum was not issued a license by the Commonwealth of Pennsylvania.

As to the inaccuracies, Blum's birthdate was listed as November 2, 1938 and his age as forty. The Social Security number was listed as unknown and the rest of the document as stated above was boiler-plate. Howard Blum at that time was thirty four (34) years old and his date of birth is October 10, 1945 (App. 68a). The inaccuracy is raised to the status of material and renders that document useless when we are further told by Trooper Litzenberger (App. 53a - 61a) that both the individual's name and birthdate are inserted into a computer to ascertain whether or not a license has been granted. If the birthdate insreted with the name is incorrect, the search may not be accurate. Troop Litzenberger further explained what he meant by "<u>may be inaccurate</u>" (App. 61a) by stating that if a name and birth-date are submitted the computer is designed and programmed to search on either side of that date for a period of two years. In this particular case the birthdate given to Trooper Litzenberger by the government and the date inserted into the computer to do the search was November 2, 1938. Therefore, if Howard Blum's birthdate is October 10, 1945

and therefore not within the four year range the search was inaccurate and did not prove a license was not issued to Howard Blum. That sealed document, Government's Exhibit #62, therefore, should not have been admitted, over objection,into evidence at trial. More importantly, it is submitted that the jury could not conclude after considering the eivdence in a light most favorable to the government that the defendant, Howard Blum was guilty of unlawful possession of a firearm in the commission of a felony "beyond a reasonable doubt".

The within issue was raised by Blum when the evidence was sought to be introduced (App. 69a - 73a) during his argument on motions for judgment of acquittal following the government's case in chief (App. 74a - 76a) and following the completion of all the evidence (App. 77a - 80a).

Wherefore, Blum requests that this court enter an order reversing the judgment of conviction on Count II and dismiss that count of the indictment against him.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respcetfully submitted:

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September, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RECEIVED
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SUPREME COURT, U.S.

No. 79-2701

UNITED STATES OF AMERICA

vs.

Howard Gregory BLUM
James Donald BECKMAN
Peter J. MACHI
Aedan Charles McCARTHY

HOWARD GREGORY BLUM

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 79-00138-01)

Submitted Under Third Circuit Rule 12(6)
August 4, 1980
Before: ALDISERT and SLOVITER, Circuit Judges, and HANNUM, District Judge.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the trial court erred in not suppressing the physical evidence found in the duffel bag at the time of defendant-appellant Blum's arrest where there was no consent to search and a warrant was not obtained; (2) since there was no probable cause to arrest appellant-defendant Blum, the evidence flowing from that illegal arrest should be suppressed; (3) Blum was denied due process and effective assistance of counsel by the trial court when the court ruled that neither Blum nor his counsel could hear the reasons for the government not revealing the last known address of Robert Eugene Mercier; (4) the trial court erred in charging the jury that once an overt act was

* Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

committed following the conspiratorial agreement, no participant in that agreement could validly withdraw; and (5) the evidence is not sufficient to sustain the verdict against defendant-appellant Blum as to Count II of the indictment; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

Attest:

Sally Mrvos, Clerk

DATED: AUG 4 1980

COPY

Certified as a true copy and issued in lieu of a formal mandate on August 26, 1980.

Test: SALLY MRVOS

Clerk, United States Court of Appeals for the Third Circuit

Q Are you presently assigned to the Pittsburgh area?

A I am.

Q Are you the case agent on this case?

A Yes, I am.

Q Could you relate to the Court the date your investigation began?

A On July 19, 1979.

Q What prompted your investigation?

A I received information from a confidential source that James Donald Eckman, Howard Gregory Blum, from the Youngstown, Ohio, area, and two individuals from the Pittsburgh area, one being a Pete, last name unkown, and the other being a Mac, last name unknown, were planning to rob an armored car belonging to the Cauley Armored Car Company, in Sharpsburg, Pennsylvania.

Q Was there any mention concerning any vehicle at that time?

A Yes. At the time, I was advised that Pete, the gentleman named Pete, had a 1976 GMC van, and I was provided the license number for that van.

Q Now, based upon that information, what, if anything, did you do?

A At first, I determined, through the Pennsylvania Department of Motor Vehicles, who was the registered

owner of the license number in question.

Q And what was your determination?

A The owner was Peter J. Machi.

Q Now, concerning the information that you received, what, if any, information did you receive concerning what was the subject?

A I was advised that the four gentlemen planned to rob an armored car belonging to Cauley, that made a daily run between Pittsburgh and Butler, Pennsylvania, and back. The date of the robbery would be on a Tuesday.

Q Now, that was July 19, 1979; is that correct?

A Yes, sir.

Q And, at that time that you received the information, you did not know whether it was true or correct?

A That is correct.

Q Did you receive any other information after that?

A Yes, sir. On July 23, I received information from the same source that the specific car in question would be car number twelve, armored car number twelve, and that the robbery would take place at a place called the Valencia Lounge, located on Route 8 in Valencia, Pennsylvania.

Q Did your information give any reason as to why they would be at the Valencia Lounge?

A Yes. It was advised -- given to me that, every

day, at approximately 2:00 p.m., the drivers of the armored car number twelve, on the way from Butler back to Pittsburgh, stopped at the Valencia Lounge and left the vehicle unattended.

Q Now, at that point, what was your understanding as to what these four named individuals were going to do?

A My understanding, at that time, was these four individuals planned to rob that armored car while that vehicle was unattended.

Q Immediately?

A No, sir. My understanding was that there would be a series or one or two trial runs, to determine if, in fact, the above situation did exist.

Q Now, based upon the information that you received on July 19 and July 23, 1979 -- by the way, was that information on those two dates from the same source?

A Yes, it was.

Q Based upon that information, what did you do in your investigation?

A Following the telephone call, the FBI, including myself -- I interviewed a gentleman by the name of Coleman McGivern, who is the President of Cauley Armored Car Company in Sharpsburg.

Q Where is it located, Sharpsburg?

A Yes, sir, on Main Street.

Q And what, if anything, did Mr. McGivern advise

they were arrested and several guns taken from them, and apparently just --

MR. JOYCE: Excuse me, Your Honor. I think it is important, the photographs -- it is important, I believe, for the Court's understanding. The photographs show the four accused men present not at the armored car site, but at a site approximately a mile away. Okay. That is important, I think.

THE COURT: All right.

Now, let's find out whether that evidence should be suppressed. I take it thatthe theory of the Defendants is that there was not probable cause to arrest, and, therefore, they shouldn't have been arrested, and, therefore, what they had in their possession should be suppressed.

Is that your theory?

MR. ZIMMERMAN: That is correct, Your Honor.

THE COURT: Why don't we get into that now?

MR. WHITE: Your Honor, if I may amplify that, there is also the question that, after the arrest, what right did the Government have to search certain bags that might have contained the evidence? And, under Chadwick, we would maintain that, at that juncture, they may have been required to get a search warrant. So it isn't just the arrest, Your Honor.

there were two individuals in the front seat.

Q Were you able to determine whether any of these individuals were in that truck, that evening?

A None of these Defendants, to the best of my knowledge, were in that truck.

Q Now, let me call your attention to the following day, as you say, July 24, 1979. Did the FBI do anything that day?

A Yes; we conducted a surveillance on armored car number twelve.

Q Can you explain what time your surveillance began and what you did?

A Firstly, we conducted a surveillance in the morning, between 9:30 and 10:00, I believe we started, downtown in Pittsburgh, when the armored car came to make the pickup at the major banks in town. We had surveillance on that vehicle through its route through North Side Pittsburgh, up Route 19, across Route 8, up to Butler, Pennsylvania, and back. Also, we conducted a surveillance inside the lounge. The surveillance inside the lounge commenced at approximately noon.

Q Did the FBI observe the armored car arrive at the Valencia Lounge?

A Yes, sir.

Q At what time?

A The drivers parked their vehicle, locked it, and both drivers went inside the lounge.

Q And were there FBI agents inside the lounge?

A Yes, there were.

Q And where did these drivers go?

A As you enter the Valencia Lounge, the bar area is on the right side of the building. The drivers went to the far right of the bar, with their backs to the window, which would be in the northern wall of the building. Behind them was a window, and, on the other side of the window, in the parking lot, was the armored car.

Q Was anyone else seen -- observed inside the lounge at that time?

A Agents observed Mr. Eckman.

Q And which agent observed Mr. Eckman?

A Special Agent Donna Acoth.

Q Now, following the surveillance on July 24, 1979, did you receive any other information?

A We received -- I received information from the same confidential source that the first run had been satisfactory and that another run would be made the following week, which would be the 31st of July.

Q Did you receive any other information after that?

A I received information that the four gentlemen

in question had decided that Tuesday was definitely the day that they would rob the armored car, and that what they had planned to do, prior -- on the weekend prior to the Tuesday of the robbery, they would steal two vehicles, preferably trucks or vans, and they would secrete these two vehicles in a position nearby that they could readily get to them on a Tuesday morning.

Q Now, was this, again, from the same source?

A Same confidential source.

Q Prior to -- did the FBI maintain a surveillance the following Tuesday, on July 31, 1979?

A Yes.

Q Prior to the surveillance on July 24, 1979, and the surveillance on July 31, 1979, did you learn any information concerning any weapons or keys?

A I received information from the same confidential source that, on prior days or dates during the month of July, that the four Defendants had come to the armored car company at Cauley's; they had, in fact, entered the armored car company -- armored car number twelve; that they had obtained locks to the driver's door, to the ignition, and to the rear -- I am sorry -- at that time, two keys; and that they planned to come back and make a key to the rear vault compartment of the armored car.

Q Now, did you recieve any --

did you do?

A The FBI placed a call to German Motors in Latrobe, Pennsylvania, and talked to a representative of their staff, who advised, in fact, a theft had occurred that weekend preceding that date, and they had, in fact, lost two vehicles, and the description they gave us was verified to be the same description I had received from the confidential source.

Q Now, prior to August 7, 1979, did the FBI have any information concerning the type of weapons that might be used?

A On the 6th of August, I received information from a confidential source that, in addition to the stolen motor vehicles, the four individuals would arrive at the Valencia Lounge in possession of an M1 carbine rifle, two handguns, and possibly a shotgun.

Q By the way, the representative at the German Motors -- do you recall the individual's name?

A I believe the gentleman's name was Tom O'Connor that verified the theft.

Q Now, you verified this on August 6, 1979?

A That is correct.

Q Was any other verification done concerning the vehicles?

A Yes. We verified with the Pennsylvania State

Police, on the 7th, prior to the arrest; and they stated that German had, in fact, entered a theft report, over the weekend preceding that day.

Q Did you conduct a surveillance on Tuesday, August 7, 1979?

A Yes, I did.

Q And was it your belief that, that time, that was only a milk run?

A No. It was a belief, based on information we received, that this would be an actual robbery.

Q And could you relate what you observed on that day?

A On that day, the armored car was again surveilled, this time not from downtown Pittsburgh, but from its garage in Sharpsburg, to Butler, to the Valencia Lounge. Also, it was surveilled -- the grounds of the VAlencia Lounge, the area surrounding the Valencia Lounge, up and down, north and south of the lounge.

Q Was the armored car observed pulling into the Valencia Lounge, that day?

A Yes.

Q At what time?

A Approximately 2:00 o'clock in the afternoon.

Q Prior to the armored car pulling in to the lounge, did you observe any other vehicles?

A Shortly before the armored car appeared, a white 1965 Ford four-door sedan, registered to Christine Machi, was driven into the parking lot of the Valencia Lounge by Mr. Peter Machi. Following behind him was a 1979 Ford Bronco, exact description of the stolen vehicle from German Motors. This vehicle was driven by Mr. Eckman.

After parking his vehicle, Mr. Machi was observed walking from his vehicle to the Bronco, and, in his left hand, he was carrying a blue shirt or jacket that was rolled up. He walked across from his vehicle to the Bronco, entered the vehicle with Mr. Eckman. This vehicle then exited the parking lot and proceed south, away from the Valencia Lounge.

Q What was observed after that?

A Within minutes of this, a 1978 Ford Econoline 150 van, white in color, was observed proceeding north on Route 8, north of the lounge, toward the direction of Butler, Pennsylvania.

Q Now, could you identify this vehicle?

A This vehicle, again, was the same description of the vehicle that I had been advised had been stolen from German Motors.

Q Was this 1978 Ford Econoline van observed after that?

A Yes. This same vehicle was observed, within

Mr. Eckman and Mr. Blum?

A That is correct.

Q And did it stay there?

A No, sir. It drove through, slowly, and it proceeded to exit again.

Q In which direction did it go?

A Again, it proceeded south on Route 8.

Q Did you observe the Bronco after that?

A Yes, sir. Approximately 15 to 20 minutes later, the Bronco again returned. It entered the parking lot of the Valencia Lounge, this time driven by Mr. Eckman and accompanied by Mr. Machi. It again proceeded to drive slowly through the parkinglot area, past the armored car, at which time it stopped. Mr. Machi exited, walked over to his 1965 Ford vehicle, at which time he started his engine, and this car proceeded to back out of the lounge. During this time, the Bronco driven by Mr. Eckman started to exit the parking lot at the Valencia Lounge.

Q Now, at that point, what, if anything, did the FBI determine?

A At this point, based on information we had that the robbery would take place in two stolen vehicles and that we had just observed two vehicles bearing the description of the stolen vehicles, and that we had information that weapons would be in these stolen vehicles, the

decision was made to arrest the four individuals.

Q Now, initially, on that day, August 7, 1979, what was your plan as to when any arrest would be made?

A Initially, after discussion with the United States Attorney's Office, our plan was to primarily let the robbery occur, in that -- let one of the subjects actually enter the armored car. This plan was contingent on the safety of others present. Normally, when we had gone out and observed the Valencia Lounge, there was generally no more than three or four vehicles at a time up there. Many times, most of the cars parked there were cars driven by the FBI agents who were observing. On the day in question, the 7th of August, there were, for the first time, people there that had never been there before. The first time that the Bronco appeared, we had a young, small child riding a motor bike in the area of the lounge. At the same time, we had a gentleman moving grass in the lounge. The second time the vehicle came back, there was a pickup truck parked, with a woman and a husband and a child -- not husband -- a man, woman, and child. The man exited the pickup truck and went into the lounge, leaving the woman and child in the pickup truck. The third time that the Bronco came back, the first pickup truck had left, and another pickup truck had come, with a woman, children, and a man. This pickup truck was pulling a horse van. Again, the man went into the lounge, leaving

CROSS EXAMINATION

BY MR. BEIER:

Q Would it be a fair statement, Mr. McCarthy, to say that the originator of this plan to rob the armored car was not Mr. Blum?

A Yes.

Q In fact, this scheme or plan to rob the armored car, would this -- Did you originate this scheme?

A Myself and Pete Machi.

Q Then sometime later you contacted Mr. Eckman, is that correct?

A Yes.

Q When did you first meet Mr. Blum?

A In July. I met him with Mr. Eckman and that other man named Gene at the Friendly's Ice Cream place up in Fox Chapel.

Q That was approximately in the middle of July a couple weeks prior to August the 7th?

A It was a little before the middle. It was more towards the beginning of July.

Q You indicated earlier when you were testifying that you had been convicted of crimes on four separate occasions, is that correct?

A Yes.

Q And that began in New Haven, Connecticut in 1958?

A We parked the white van and we all got out and then Blum and Eckman got into the Bronco and they took a ride down to the Valencia Lounge. They wanted to just look it over to see what was happening down there.

Q Is that the purpose?

A Yes.

Q And did they come back?

A They came back a few minutes later, yes.

Q And when they came back, what if anything was decided?

A Well, we knew we couldn't do the robbery that Tuesday because the armored car was out in the front and there was no way we could do it so we would have to wait until the following week so we were going to then go back to Pittsburgh but before we left to go to Pittsburgh Machi said -- he'd reminded us he had to go get his car.

Q What happened?

A Well, Machi got in the Bronco with Eckman and he drove down to the Valencia Lounge. A few minutes later Eckman pulled back into the parking lot of Uncle Charlie's and followed by Machi in his car.

Q When Mr. Eckman pulled in with the Bronco, where did he pull?

A Into the parking lot near where I was standing.

Q Where was the other van parked?

A I don't know. Maybe 20 feet away. It was parked in the parking lot maybe 20 feet away.

Q Were you and Mr. Blum both standing outside?

A We were over by the white van. We were getting ready to leave and then Blum reminded me to get the keys from Eckman for the van that Eckman had parked down at North Park so I could get that so I walked over to get the keys from Eckman. He was sitting in the Bronco and I got over there and I got the keys from him and --

Q Had Mr. Machi pulled in by that time?

A He was already sitting there. He was waiting for us to leave.

Q Then what occurred?

A I was standing there getting the keys from Eckman. I had just got the keys from him and all of a sudden a car pulled into the parking lot and somebody yelled to me not to move, put up my hands. I looked up and there was a shotgun sticking out the window of a car.

Q Was one of the individuals that you saw in the car Agent Pedriera?

A I don't recall if I saw him in that car. I saw him a few minutes or something after.

Q You were placed under arrest at that time?

A Yes.

driving down the highway.

Q And, of course, I take it that whoever spoke could have said: Let's forget about this plan, isn't that right?

A You mean let's abandon it altogether?

Q No, I'm trying to get the language. Couldn't he have said: Let's forget about this?

A I think if it was more, there was probably some swearing because we were mad we couldn't do the robbery and we were kind of mad about it that the truck wasn't in the right place and when we got up to Uncle Charlie's we got outside and we said: Well, let's get out of here. We talked for a few minutes about we couldn't do it and we said: Well, let's get out of here.

Q And with that I would take it that that would indicate that Mr. Eckman and Mr. Blum were going to go back to Ohio and you and Mr. Machi were going to go back to Pittsburgh.

A What we were going to do first is we were going to take the van and the Bronco back and park them where we had picked them up that morning.

Q That's what you had in your mind to do, right?

A Yes.

Q From what you have said, Mr. Machi didn't supply any tools that went into that bag, that duffel bag.

A No. He didn't supply anything.

there are areas of the street that were ripped up.

A In front of Cauley's yes there are areas of the street that are ripped up.

Q And did you follow this vehicle?

A For a very short distance, yes.

Q And you still weren't able to ascertain who was driving, right?

A That's correct.

Q Or who else was in the car, I mean in the van at that time?

A We recognized one of the individuals in the van.

MR. WHITE: No further questions.

THE COURT: Any redirect?

MR. SCHWABENLAND: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. SCHWABENLAND:

Q Who did you recognize in the van?

A We recognized a Robert Eugene Mercier.

MR. WHITE: I didn't get that name, Your Honor.

A Robert Eugene --

THE COURT: Can you spell the name for them?

THE WITNESS: Robert Eugene Mercier. I believe it's spelled M-e-r-c-i-e-r.

BY MR. SCHWABENLAND:

Q Has your investigation been able to determine

Brady material at this time.

MR. WHITE: That would apply to all defendants, is that correct?

MR. SCHWABENLAND: Sure.

THE COURT: All right. Let the record show that the motions for judgment of acquittal of Mr. Zimmerman have been denied. The motions for judgment of acquittal made by Mr. White on behalf of Mr. Machi will be denied. The motions for judgment of acquittal made by Mr. Beier for Mr. Blum are denied. It's the Court's view that there's ample evidence not only of a conspiracy but of the unlawful carrying of firearms and the commission of the conspiracy in the event that the jury determines that the conspiracy existed. It's no answer to say that the last minute change of plans renders Count 1 invalid. Once a conspiracy is made and once an overt act is carried out by one of the conspirators, there's evidence upon which a jury can find that the offense of conspiracy existed. It will, therefore, be a jury question whether the conspiracy existed.

That's all, gentlemen. Take a few minutes for yourselves to relax and then we'll call on the defendants in order. Mr. Blum will open first.

MR. BEIER: Your Honor, in that like, I wonder if I might make one request and that is that if possible that the Government if they have this information turn it over the

address of Mr. Robert Eugene Mercier. We first found out about his name during this trial. We don't have his address. We would like him subpoenaed since we believe he's a material witness to this case having been identified by Mr. McCarthy as well as by the FBI agents as apparently playing a significant role in this alleged conspiracy and we believe without his presence we will be greatly prejudiced and not able to prove the entrappment defense that we earlier suggested.

MR. SCHWABENLAND: Do you want me to respond?

THE COURT: Yes.

MR. SCHWABENLAND: I would object to even saying, No. 1, whether or not we have the address. I don't know of any entrappment defense on the record at this point.

THE COURT: Well, in short you don't want to reveal the address of the man called Gene who has been identified by an FBI agent here as I recall it as Gene Mercier.

MR. SCHWABENLAND: Well, in short what I'm saying is that I would prefer not to even reveal whether or not we have the address at this time.

MR. BEIER: We believe he's a real key witness. I mean since he was certainly involved and if he could come forward certainly according to Mr. McCarthy would substantiate his testimony. He was identified by not only Mr. McCarthy but the FBI and by only having his name and not his address, he's not equal to us as he is to the Government. We do not have it

THE COURT: Proceed.

MR. SCHWABENLAND: No. 1, there are certain reasons why we cannot comply with the Court's order and I would like to state those reasons.

THE COURT: I haven't made an order yet. I said I'd take it under advisement and see what your reasons were for not revealing the address.

MR. SCHWABENLAND: Okay. I would like to give you the reasons with your permission in camera and ask that the transcript be remained sealed and you can make a determination of whether or not those reasons are sufficient at this time.

THE COURT: All right. Do you want to respond to that, gentlemen?

MR. WHITE: On behalf of Peter Machi, I would object to that on the ground that the Government having injected this man's name into the trial now refuses to let us, the defendants' counsel know the reasons why his address cannot be revealed. We're entitled to know that so that we can properly make a record and attempt to ascertain if we deem those reasons sufficient.

THE COURT: All right. Let --

MR. ZIMMERMAN: I join in that.

MR. BEIER: I would also join in that.

THE COURT: Let the record show that the evidence of record thus far also reveals that Mr. Machi and Mr. Eckman

also knew Gene very well and had met with him repeatedly. The only question before the Court is whether to reveal his address so that he might be used as a witness by any of the three defendants. You can come in and give me your reasons.

(A discussion in camera was had between the Court and Mr. Schawbenland the transcript of which has been sealed and filed with the Clerk of Court 12/26/79.)

changed in our opposition to the defendants' request.

THE COURT: Let the record show that the motion for the address of Gene is denied based upon the representations of the United States Attorney. All right, let's proceed.

MR. BEIER: Your Honor, I wonder since there will now be the defendant Blum's chance to bring forth his case, I had intended -- Perhaps I can ask the Court now rather than do it in front of the jury to ask Special Agent Leonard Pedriera whether or not he had any statements and the address of the individual Mercier who he's identified as being on the scene at the Cauley Armored Car when they were making keys. These are facts I think are incumbent to bring out to properly defend my client. I want to know if it's the Court's permission that I would not be permitted to ask him these questions since you have already denied the motion.

THE COURT: You mean you were going to call the FBI case agent and ask him if he had any address for Mercier? I assumed that would be objected to. We have already ruled on it and there would be no point in it.

MR. BEIER: I just want the record to show that that was my intention.

MR. SCHWABENLAND: Furthermore, we would object to any request or any questions whether or not the FBI had anything from Mr. Mercier.

THE COURT: Well, the address is the crucial thing

early morning of July 24th, 1979, what next did you do concerning your particular investigation?

A We conducted surveillances.

Q Surveillances of any particular place?

A The Valencia Lounge in Valencia, Pa. It's on William Flynn Highway.

Q What days did you conduct your surveillance?

A We conducted one on the 24th of July.

Q And did you pick any specific date or day of the week?

A Tuesdays.

MR. SCHWABENLAND: Cross examine.

CROSS EXAMINATION

BY MR. BEIER:

Q You said you conducted a surveillance beginning on the evening of July 23rd, 1979 and you spotted a van around 12:05 or 12:01 a.m. on the 24th, is that correct?

A That's correct.

Q Did you see who was driving that van?

A No.

Q You subsequently conducted a surveillance of the Valencia Lounge the following day Tuesday, the 24th?

A That's correct.

Q Did you see Mr. Howard Blum there?

A Did I? No.

Q Did you conduct any other surveillances on any other Tuesdays?

A Yes.

Q When were they?

A The 31st of July and on August 7th.

Q Did you see Mr. Blum there on August the -- July 31st?

A I did not.

MR. BEIER: I have no further questions, thank you.

CROSS EXAMINATION

BY MR. ZIMMERMAN:

Q Agent Cudone, I take it that you were receiving information all along from some informant or someone like that about this as you put it this upcoming robbery of an armored car or Truck No. 12, is that correct?

A That's correct.

Q So that you knew in advance generally at least you were told generally what may happen.

A That's a fair statement.

Q And did you relate all of this information to the President of Cauley Car Company?

A We related a number of facts to the President of Cauley Car Company.

Q Did you relate to this gentleman the date that

A This was at 10:40.

Q Did you observe the van stop or was it moving?

A The van was moving when we observed it. It had just passed our vehicle and it then exited the lot.

Q Did you see anything after the van exited the lot?

A At about 11:45 the Cauley armored car entered the parking lot, the lower parking lot near McKnight Road and stopped.

Q And it stopped where?

A It stopped adjacent to the entrance to Kaufmann's.

Q Did you see the armored car leave after that?

A No, we did not. At that time we left that area of the parking lot and made a turn around and came right back and had already departed on its route and we picked it up later.

Q Where did you pick it up at?

A On Route 8 north it had stopped at a gas station shortly after we picked it up again.

MR. SCHWABENLAND: I have nothing further.

CROSS EXAMINATION

BY MR. BEIER:

Q Did you see Mr. Blum on that day?

A No, not to my knowledge. I couldn't recognize the driver.

MR. BEIER: No further questions, thank you.

at which time we pulled off the road.

MR. SCHWABENLAND: I have nothing further.

CROSS EXAMINATION

BY MR. BEIER:

Q Did you see Mr. Blum there that day?

A Pardon me?

Q Did you see Mr. Howard Blum there that day?

A No, I didn't.

MR. BEIER: No further questions.

CROSS EXAMINATION

BY MR. ZIMMERMAN:

Q Agent, were you looking for one particular vehicle that day?

A I was advised that I may see the white and green van with that license plate.

Q While you were all sitting there at Uncle Charlie's, how many cars drove in and out?

A To my best recollection that was the only vehicle I saw. We were just there momentarily.

Q While you started your surveillance at the North Hills Passavant Hospital, is that correct?

A That's correct.

Q At 10:10 a.m. and it terminated at 12:20, is that correct?

A No, that's not correct.

three-quarters of a mile, half a mile south of Valencia Lounge.

Q Did you pass by Uncle Charlie's after that?

A Yes. At approximately 2:21 same date we -- while headed north on Route 8 again observed the same green and white van parked at Uncle Charlie's Restaurant.

MR. SCHWABENLAND: I have nothing further.

CROSS EXAMINATION

BY MR. BEIER:

Q Did you see Mr. Howard Blum that day?

A No, I did not.

MR. BEIER: No further questions.

MR. ZIMMERMAN: No questions, Your Honor.

CROSS EXAMINATION

BY MR. WHITE:

Q You testified that on this day July 24th, 1979 you saw this green and white -- this white van with green trim, is that correct?

A Correct.

Q And then you were moving at the time. Were you in a car that was moving?

A Correct.

Q Which direction were you going?

A South.

Q And then you turned around and drove back up the highway, right?

A That's correct.

Q Did you see Howard Blum sitting to my left?

A No, sir, I did not.

MR. BEIER: No further questions.

CROSS EXAMINATION

BY MR. ZIMMERMAN:

Q Had you ever seen James Eckman before July 24th, 1979?

A Yes.

Q And you used the words "He cased the place".

A Meaning --

Q Is it not what you meant he ordered a six pack and instead of staring at the bartender kind of looked around and--

A Correct.

MR. ZIMMERMAN: That's all I have. Thank you.

MR. WHITE: No questions, Your Honor.

THE COURT: I guess you can step down.

THE WITNESS: Thank you, sir.

(Witness excused.)

THOMAS F. O'CONNOR

called as a witness by the plaintiff, first being duly sworn, testified as follows:

Q Government Exhibit No. 55?

A Photograph of James Eckman as he was taking the T-shirt out of his Monte Carlo.

Q And Government Exhibit No. 56?

A Also a photograph of James Eckman at the Monte Carlo scene.

MR. SCHWABENLAND: I would offer into evidence Government's Exhibits 46 thru 51 inclusive and 55 and 56.

THE COURT: They'll be received.

MR. SCHWABENLAND: I would ask the Court's permission to pass these to the jury.

THE COURT: All right.

(Exhibits were shown to the jury.)

THE COURT: Proceed.

MR. SCHWABENLAND: I have nothing further.

CROSS EXAMINATION

BY MR. BEIER:

Q Mr. Gumto, you said you have taken pictures and you have identified them and they are pictures of Aedan McCarthy, Mr. Machi and Mr. Eckman. Did you see Mr. Howard Blum there that day?

A No, I didn't.

MR. BEIER: I have no further questions.

A Mr. Machi and Mr. Eckman.

Q Did you see Howard Blum at all during that day during your surveillance?

A I didn't see him. That's not to say he wasn't there.

Q He's sitting to my left now. Do you recognize him as being there that day?

A Not to the best of my recollection, no, sir.

MR. BEIER: I have no further questions.

CROSS EXAMINATION

BY MR. ZIMMERMAN:

Q Sir, during the three hours you spent in the bar while you were on duty, were you drinking alcoholic beverages?

A I had a couple of beers, yes, sir, along with some sandwiches and some coffee.

Q And how about your partner, Misko, was he also drinking at the time?

A He had one or two beers, yes, sir.

Q What was Mr. Eckman wearing?

A Mr. Eckman was wearing a white T-shirt, a blue short brim white hat, blue jeans. That's about it.

Q Shirt have a collar on it?

A No, sir.

Q Just a regular old T-shirt?

A Yes, sir.

instructed that if you find that the conspiracy that is to say the plan to commit in this case armed robbery was abandoned on the date of the crime and there was no further attempt to subsequently commit that crime, then you must find the defendant not guilty." I don't think we should refer to this as armed robbery. It's merely a violation that prohibits the stealing of money belonging to a bank or Federal savings and loan institution. I intend to instruct the jury generally on the question of withdrawal from a conspiracy. I don't think that this is a strict statement of the law. You see, under McCarthy's testimony, which is the only testimony concerning the plan that the conspirators had in mind, as I understood it, the armored car was parked in the wrong place. There were too many cars in the Valencia parking lot. There were too many people, too many people in the lounge and when they surveyed the situation, they retired to Uncle Charlie's. They chagrined determined that their plan wouldn't work that day and they would postpone the plan until the following Tuesday, Tuesday being the day they knew that the armored car was heavily loaded. There's no testimony that the plan was abandoned permanently. The real question is what would the law be if the testimony was that they looked the situation over and decided that this plan would never work and they decided on August 7th to give it up forever. Would there have been a conspiracy? If there would have been according

To put it another way, a reasonable doubt exists when after careful and impartial consideration of all the evidence in the case the jurors do not feel convinced to a moral certainty that the defendant or defendants are guilty of the charge. If you have such a doubt as to any material part of the Government's case, it would be your duty to resolve it in favor of the defendants and to acquit them. If you have no such doubt, it would be your duty, of course, to convict the defendants. The Government is not required to prove its case beyond all doubt but it is I repeat required to prove its case beyond a reasonable doubt.

The indictment in this case charges that from about May 1st, 1979 continuing up to August 7th, '79 in the Western District of Pennsylvania and elsewhere Howard Gregory Blum and James Donald Eckman and Peter J. Machi and Aedan Charles McCarthy willfully and knowingly did conspire and agree together and with others whose names to the grand jury are known and unknown to commit an offense against the United States, that is, that these defendants willfully and knowingly did conspire and agree together and with others whose names are known and unknown to steal money exceeding one hundred dollars belonging to the Union National Bank of Pittsburgh, the deposits of which were then insured by the Federal Deposit Insurance Corporation; that it was part of the conspiracy that these four men planned to take and carry away money from Armored Car No. 12

that address or been able to get to Gene to find out what the background facts were but it does appear that as Mr. Zimmerman said that without Gene this thing could -- this alleged conspiracy, the object of it could not have been carried out and in addition to the burglary to get the locks was the stealing of the cars that couldn't have been accomplished without Gene and it does appear that the informant, assuming it was Gene, was working with the authorities on July 19, 1979.

MR. BEIER: Defendant Howard Blum would join in that. Additionally add that Defendant Blum never having been brought into this conspiracy since it appears on the record that he came in at the same time this Gene came to the record of Robert Eugene Mercier.

THE COURT: Anything else, gentlemen?

MR. BEIER: I just have one additional motion that I would renew my objection to the chart Mr. Schwabenland drew which I believe was sustained, however, the chart throughout this trial has remained in view of the jury and the particular page that is exposed has my client's name on it and in view of the fact that that was to have ceased and desist, it has not been removed and, therefore, I believe my client has been prejudiced by that.

MR. WHITE: I would join in that motion also, Your Honor.

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No. 45, the ones that Mr. Machi had. Look at the ones that Mr. Blum was alleged to have had. Do they ever look -- Do they look like they were ever used? Mr. McCarthy told us they stopped into Zayres on the very day this conspiracy was culminated. Perhaps he bought them then. We don't know but in any event, how do you reconcile the testimony of Mr. McCarthy that Mr. Blum was there on all these occasions when the FBI was there and not one of those FBI agents ever saw Mr. Blum? When you look at the evidence, three masks, three walkie talkies, three masks, three guns, does it appear that Mr. Blum was a part of this from the beginning as Mr. McCarthy tells us? That's up to you to decide.

Mr. McCarthy also tells you regarding this conspiracy that it was abandoned; that they went to the Valencia Lounge on August 7th, 1979. Because of the location of the armored car, they decided not to attempt to take any money from this car. If in fact that's true, then there's withdrawal; there is no conspiracy, however, he does say that he planned to do it the following Tuesday. When I asked him whether they ever discussed that there was any subsequent meeting after they decided not to commit this robbery, he tells us no, there was not. It was his thought they were going to do it next Tuesday. As far as everybody else was concerned, it was off. It was off in the same way that one other individual who's been identified as Mr. Robert Eugene Mercier. We don't see him here

I'd refer to the Point No. 18 wherein I would request that the Judge would have charged that the jury must consider independent acts of the defendant himself; that there has to be at least some overt act by the defendant himself in addition to the statement of the defendant McCarthy who's a co-conspirator and the statement he gave proved that he was guilty of this conspiracy. I would also object to the fact that there was the adverse inference charge given regarding the refusal of the Government to give us the address of Robert Eugene Mercier. I would object in that the jury I don't believe was charged that if they believed that McCarthy deliberately or intentionally swore falsely to a material fact that they had a right to disregard his entire testimony.

THE COURT: I think that was specifically covered.

MR. BEIER: I may have missed that.

THE COURT: All right. Go ahead.

MR. BEIER: And lastly that the charge regarding withdrawal or abandonment was not -- is what I believe the law is in this case as we stated prior to the Judge in chambers namely, that is cited in the case of United States of America vs. Gypsum Company, 550 Federal 2nd 115 in that there can be a withdrawal even after there's an overt act committed in furtherance of the conspiracy.

THE COURT: All right. Anything else?

MR. BEIER: That would be all, Your Honor.

the FBI had obtained permission from German Motors?

A Yes, sir; we did.

MR. SCHWABENLAND: I have nothing further.

THE COURT: All right. Now, I will let you gentlemen cross examine in the order in which the Defendants' names appear on the indictment. First, Blum. Mr. Beier.

CROSS EXAMINATION

BY MR. BEIER:

Q Mr. Pedreira, the first time you received any information was on July 19?

A That is correct.

Q You didn't receive any information in May or June about this particular --

A No, I did not.

Q -- conspiracy?

A No.

Q Had there been an investigation begun before July 19?

A Not to my knowledge.

Q When you said you received information regarding four gentlemen, were you given the names of these four gentlemen, back on July 19?

A I was given Mr. Blum's name, Mr. Eckman's name, a gentleman named Pete, who owned a van with the license number, and a gentleman named Mac.

Q And that was all on July 19?

A Yes, sir.

Q You said you made, prior to the arrest, two surveillances that you called dry runs. Did you see Mr. Blum there on either of those occasions?

A Not on the 24th or 31st; no, I did not.

Q Did any other member of the FBI, to your knowledge, see Mr. Blum on those dry runs?

A No, sir.

Q Do you have any knowledge that Mr. Blum met with any other individuals in July of '79, in the Pittsburgh area?

MR. SCHWABENLAND: I object to that question, Your Honor.

THE COURT: The reason?

MR. SCHWABENLAND: The reason is that it -- I will relate to the Court that the investigation is continuing, and it is not relevant to this information, the information concerning probable cause by the agent, concerning the surveillance on the two days, plus the arrest on August 7, 1979.

THE COURT: Well, your reason is that this is attempting to get into discovery that is not really relevant to the probable cause issue?

MR. SCHWABENLAND: Yes, Your Honor.

THE COURT: I think that is right. The issue before me right now is whether or not there was sufficient probable cause to make these arrests and the searches incident to them. The objection is sustained.

BY MR. BIER:

Q Regarding any of the other surveillances that you made, I believe you said on the 23rd --

A Twenty-fourth.

Q Well, on the 23rd, weren't you at the Valencia Lounge? Am I correct in that?

A You are correct on that, but I was at the Valencia Lounge on the 24th.

Q There was no surveillance on the 23rd?

A There was a surveillance in the late hours of the 23rd and the early hours of the 24th.

Q Was Mr. Blum seen by anybody at that time?

A No, sir; not by me.

Q By anyone else, to your knowledge?

A No, sir.

Q And he was not inside the Valencia Lounge on the 24th, when you were there on that day; was he?

A No.

Q Did you find any keys on Mr. Blum that fit the armored car vehicle number twelve, either the ignition or the door or the rear vault?

A No, we did not.

Q Did you find any weapons on him?

A On his person?

Q Yes.

A No, I did not.

Q Do you recall testifying, earlier in this case, at the bond reduction hearing?

A Which bond reduction hearing are you referring to?

Q For Mr. Blum, I am referring to.

A I testified at his bond reduction hearing, but I don't know what you are referring to.

Q But you do recall testifying?

A I did testify at his bond reduction hearing; yes, sir.

Q Now, you earlier, I believe, said, earlier today, Mr. Blum was in a vehicle with Mr. Eckman on the day of the arrest, August the 7th; is that correct?

A That is correct.

Q Did you personally see him in that vehicle?

A He was seen by Special Agent James Garcia.

Q You did not see him?

A No, sir; I did not.

Q You did not see him in any vehicles, this day or any other day?

A I did not see him personally; no.

Q Do you recall, at the bond hearing, telling us that the person identified with Mr. Eckman was actually unidentified, and Mr. Blum was not seen in any vehicles, to your knowledge?

A At the time I testified, I was not aware of the fact exactly who was -- I was under the impression that individuals were in certain cars, but, as all the paperwork came forth from all the agents who were present on the day of the apprehension, I was made aware of who was where and who was in what vehicle, but I did not have that information at the time I testified prior.

Q You did say he was unidentified. Did you know the individual who was with Mr. Eckman in the car?

A At the time, to my knowledge, he was, as I said, as I received the reports from the agents on the scene, by that, I was able to determine who was where.

Q When did you receive this information about Mr. Blum?

A Subsequent to the bond hearing.

Q At the time the complaint was sworn out by you and the initial arrest of Mr. Blum and the other three Defendants was made, I take it that all the information in the complaint was all the information you had at that time; that is, the information upon which you based your arrest and

the probable cause for the arrest?

A At the time that complaint was made, it was made to the best of my knowledge at that time.

Q And in that complaint, you never identified Mr. Blum, did you, as being in any vehicle?

A If you wish to let me read the complaint, I will recall what was in it. I don't know the exact wording of the complaint.

(The witness was furnished a document, which he examined.)

THE WITNESS: Thank you.

Now, your question is whether or not Mr. Blum was named as being in any of the cars?

BY MR. BIER:

Q Correct.

A On what specific day, the 7th?

Q Any day.

A This complaint does not state Mr. Blum was an occupant of any particular car on any particular day.

Q In fact, this complaint is five pages long; is it not?

A That is correct.

Q And would it be fair to say that the only place Mr. Blum's name is even mentioned is on the very last paragraph on the last page, wherein it says he was observed

to meet, in the immediate vicinity of the Econoline and Bronco, with three other individuals?

A He is mentioned on the last page; yes.

Q That is the only place his name is even mentioned, and the only mention is he was meeting with these three individuals on the day of the arrest?

A Well, it mentions, further down,, he attempted to flee.

Q The very last line?

A Yes.

Q After the arrest?

A When he was advised he was under arrest, he attempted to flee. Yes.

MR. BEIER: I have no further questions at this time.

THE COURT: All right.

Mr. Zimmerman, are you next, here?

MR. ZIMMERMAN: Thank you, Your Honor.

BY MR. ZIMMERMAN:

Q Agent, did you tell us that, on July 19, you were contacted by a person that you have recited as a confidential informant? Is that correct?

A Yes.

Q Was this a personal meeting or a telephone call?

THE COURT: Now the evidence here is overwhelming that none of the others had any license. If you have a license, the proper thing to do is introduce your license to carry a firearm, not the birth certificate or driver's license. The witnesses that came from the city and the county and the state all testified that they found no licenses for these people and the only little loophole you're contending for is that perhaps the man from the state made a little mistake in searching his computer and put in the wrong birthdate. The man from the county didn't and the man from -- or the woman from the city didn't so we're dealing with an infinitesimal thing here and I can't give you any substantial recess. What I want you to do is get on with your defense, open to the jury if you're going to open. If you're going to call witnesses, let's call them and quit fooling around.

MR. BEIER: I would just indicate to the Court that I'm not going to call any witnesses and I will rest immediately. I would just put on the record that I have not been able to obtain the address of Robert Eugene Mercier and I believe that my side is prejudiced by not obtaining that address and not being able to call him as a witness and I would ask that the Court consider a charge in terms of the adverse interest that can be drawn where a witness not equally available to both sides that the testimony should be --

guilty if you believe Mr. McCarthy. That's a big if but let's assume for a moment that you did. What then would there be to even question? Well, there would be two things I think at least as far as Mr. Machi goes.

Number one, you heard from Mr. McCarthy that on the day that this thing was supposed to occur, August 7th, that they got to this place, this Valencia Lounge and all four individuals were in one vehicle and all four individuals agreed that it wasn't going to take place. Now he hemmed and hawed over that when we asked him a lot of questions about that but it raises a very interesting question because even if you believe everything that McCarthy says, then you have to deal with the fact that this conspiracy came to an end because they had agreed that it wasn't going to happen that day and the law is that unless the agreement is in effect on the day that the Government charges that it was supposed to happen then there is an absolute defense if you find that's what happened that the conspiracy was abandoned and all four people decided that it wasn't going to take place. I hope I'm making myself clear on that point. You remember that they're in the vehicle and they're all pulling away from the Valencia Lounge where Cauley's Armored truck is. They were not caught or stopped or bothered at that point according to Mr. McCarthy and all the Government witnesses but they drove up the road and at Uncle Charlie's

about a mile or a half a mile or three quarters of a mile, it doesn't make any real difference, that is where the arrest took place, not near the armored car because according to Mr. McCarthy, they had all said: We can't do this. Forget it. This is crazy and that's what happened. Now even if you believe everything that McCarthy said, you have to deal with that fact that the conspiracy was not in existence at the time they were arrested and they had abandoned the idea. I expect that Mr. Schwabenland when he gets up in rebuttal will say: Oh, no, that's not what they said happened. They said they were going to postpone that. Mr. McCarthy wasn't clear on that that they were going to postpone it. He said: We were thinking of postponing it or doing away with it. He couldn't remember who said what in the van at the time but if you find, and it's within your province to find this, that all of these men according to Mr. McCarthy who were there to do this dirty deed agreed that they weren't going to do it, then there was no crime committed and there was no conspiracy in which case it is your sworn duty to apply the law and say these men are not guilty. There was no crime committed. Now that's if you believe everything that McCarthy says.

Now with regard to what McCarthy says about Mr. Machi, about the guns, let's deal with that. Because you see again I don't know what you're going to believe so I have

McCarthy didn't repeat many statements. He merely described what he saw so it's unnecessary to grant Point 18. It's generally correct that the membership of the defendant in a conspiracy must be established by what he himself did and where relevant what he said and then 18 proceeds to deal with another subject which is the abandonment of the conspiracy. There are several subjects in Point 18 too. Let me deal with that for a moment.

I think 18(a) is unnecessary in this case because I don't believe that there are any statements attributed to Blum. There are many acts that McCarthy said he saw and 18(b) I don't think is necessary. 18(c) is a separate subject to some extent. It again deals with statements in the first sentence and in the second sentence and I think the third sentence in 18(c) is generally accurate and then the last sentence deals with a separate subject entirely and that is abandonment of the conspiracy.

MR. BEIER: Perhaps that should be broken off, Your Honor.

MR. WHITE: Your Honor, maybe we should give that another number. I haven't submitted a point on that but I would certainly like to join in that and give it a number if that's permissible to everybody.

THE COURT: We'll just identify it as the last sentence of 18(c) that's a separate subject. That reads, "You're

I'd refer to the Point No. 18 wherein I would request that the Judge would have charged that the jury must consider independent acts of the defendant himself; that there has to be at least some overt act by the defendant himself in addition to the statement of the defendant McCarthy who's a co-conspirator and the statement he gave proved that he was guilty of this conspiracy. I would also object to the fact that there was the adverse inference charge given regarding the refusal of the Government to give us the address of Robert Eugene Mercier. I would object in that the jury I don't believe was charged that if they believed that McCarthy deliberately or intentionally swore falsely to a material fact that they had a right to disregard his entire testimony.

THE COURT: I think that was specifically covered.

MR. BEIER: I may have missed that.

THE COURT: All right. Go ahead.

MR. BEIER: And lastly that the charge regarding withdrawal or abandonment was not -- is what I believe the law is in this case as we stated prior to the Judge in chambers namely, that is cited in the case of United States of America vs. Gypsum Company, 550 Federal 2nd 115 in that there can be a withdrawal even after there's an overt act committed in furtherance of the conspiracy.

THE COURT: All right. Anything else?

MR. BEIER: That would be all, Your Honor.

overwhelming. The particular times aren't of any consequence. The question is whether or not these people were surveilling the truck in the roads and the restaurant and I think your motions are entirely frivolous but I'll grant them.

MR. BEIER: Thank you, Your Honor.

MR. SCHWABENLAND: Your Honor, there's one other thing which I have to bring up now. Under the second count of this indictment, the unlawfully carrying weapons during the commission of a felony, the Government has the burden to prove not only the carrying of weapons in the commission of a felony but also the unlawfulness of part of it. According to my understanding, unlawfulness does not just mean they were carrying weapons in the commission of a felony. Unlawfulness means a totally separate thing in that they violated State or Federal law. The way I propose to do this is, No. 1, concerning the firearms. Under 18 Purdons statute 6106, they are required or a person is required to register in Pennsylvania for the purpose of carrying firearms with certain exceptions. That is a violation of State law. The reason I'm bringing this up with regard to Mr. Blum and Mr. Eckman and Mr. Machi, that applies to all to bring in people who have searched the records to say that whether or not their names appear as being registered. As to Mr. Eckman specifically, Mr. Eckman is in a different situation because he's a convicted felon. I propose to show that he is a convicted felon.

Furthermore, I have an ATF agent to call to say that Mr. Eckman has applied for disability and an exception so that he can handle weapons and that was also denied. If that could be stipulated to that it would be unlawful for him, I would have no trouble but I would have to bring up his prior conviction to show the unlawfulness. I'm only bringing this up to the Court because at the time that the Court received the third count against Mr. Eckman, it completely slipped my mind about the proving the unlawfulness.

Is that confusing or --

THE COURT: Well, it sure is but in my view if the people are carrying the firearms in the commission of a felony, I never thought it made any difference if they had a license to carry the firearms or not.

MR. SCHWABENLAND: I have checked the record or the cases and there is a difference. You have to show some violation of State and Federal law besides the actual use in the commission of a felony.

THE COURT: You mean that your burden is to show that none of them had any license?

MR. SCHWABENLAND: Well, it's the requirement in Pennsylvania that they must be registered to carry. That's under 18 Purdons 6106.

MR. ZIMMERMAN: That's a license.

MR. SCHWABENLAND: And to bring in the people to

say none of the four named individuals were registered to have them.

THE COURT: You can show I assume that none of these people had -- Well, McCarthy has already said he has no license so you're down to three.

MR. SCHWABENLAND: That applies to the firearms. By firearms I mean firearm is defined in Pennsylvania law as just being the handguns. A person although it's strange in Pennsylvania does not have to be licensed to carry an M-1 but as to Mr. Eckman, there's an added unlawfulness both in State law and Federal law and he is a convicted felon and as such cannot even possess any firearms.

THE COURT: Let me get it straighter on the record. Your position is that you have to show that none of these men had a license under Pennsylvania law to carry these firearms.

MR. SCHWABENLAND: That's correct.

THE COURT: And that you can easily show.

MR. SCHWABENLAND: Yes. I don't know if counsel wants to stipulate to that.

THE COURT: It seems to me that it would be obvious that they didn't but I don't know whether counsel will stipulate to it or not.

Will you stipulate that none of them had licenses to carry firearms?

MR. ZIMMERMAN: I'll stipulate to that. It's very

easy to prove. You get a certified copy from Harrisburg whether they had a license or not and I'm sure you've done that and there isn't any license and I don't see that that's a problem.

MR. SCHWABENLAND: If I might state --

MR. ZIMMERMAN: I think if he wants to put Mr. Eckman's prior record in, they will have to try the case again to tell you the truth. I think that would certainly be an error.

THE COURT: Let me figure this out a little bit. He conceives his duty to be to show that there were no licenses and you'll stipulate that Eckman had no license to carry any firearm.

MR. ZIMMERMAN: In Pennsylvania, yes, sir.

THE COURT: Or any other State.

MR. ZIMMERMAN: It doesn't matter. We're worried about Pennsylvania. If you had a license in Ohio and you carry a concealed weapon in Pennsylvania, you're still violative of a statute unless you're transporting it from one dwelling to another in moving.

THE COURT: The only thing you have to stipulate is that he didn't have any license to carry any firearm. Will you do that as well?

MR. WHITE: I have to check with my client, Your Honor.

THE COURT: You'll do that as well?

MR. BEIER: Well, I also have to check with my client but I'm not too sure I want to stipulate. That might go along with the inference by the mere fact that he didn't have a license this is unlawful and I wouldn't want that inference to be drawn from my stipulation. I'd be concerned about that.

THE COURT: Then you may have to call somebody to say that none of these people have a license to carry a firearm.

Now I didn't know that you had to do that. It was my understanding of the law that automatically the statute was violated if a man was found by the jury to be in the commission of a felony and in the possession of a firearm at the same time.

MR. SCHWABENLAND: I had forgotten completely during our discussion in chambers concerning the severance.

THE COURT: All right. Now the next thing you say you have to prove is what in addition to the lack of licenses?

MR. SCHWABENLAND: Well, the other type of unlawfulness. This is evidence relating to unlawfulness on the part of all individuals but more specifically as to Mr. Eckman. It's a two-fold violation, first of all, not being registered in the State of Pennsylvania to carry those weapons, the revolvers, but, secondly, as to all three the M-1, the revolvers that he is a convicted felon and as such he should

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BY MR. SCHWABENLAND:

Q Is there any special day of the week that you usually transport money?

A Usually it's Tuesday.

MR. SCHWABENLAND: Thank you. I have nothing further.

RECROSS EXAMINATION

BY MR. WHITE:

Q But it can be any day, is that correct?

A Yes, it can be any day but it's usually Tuesday.

MR. SCHWABENLAND: I have nothing. May the witness be excused?

THE COURT: Yes.

(Witness excused)

RAYMOND J. LITZENBERGER

called as a witness by the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHWABENLAND

Q Sir, your name, please, for the record?

A Raymond J. Litzenberger.

Q Sir, by whom are you employed?

A Pennsylvania State Police.

Q In what capacity?

A As trooper.

Q How long have you been a trooper with the Pennsylvania State Police?

A Approximately nine years.

Q As a trooper with the Pennsylvania State Police, what are your present duties?

A I'm presently assigned to the Records and Identification Division of Departmental Headquarters and I work in the firearms unit as the unit supervisor.

Q You mentioned firearms keeping records. What records are kept concerning firearms?

A Our office receives all the records of sale of firearms sold in the Commonwealth and we also receive copies of the license to carry firearms and the provisional firearm registration.

Q Pursuant to my request, did you make a check of the records concerning whether certain named individuals were licensed or had a permit to carry firearms?

A Yes.

Q And did you bring with you certain records today?

A Yes.

Q Let me show you Government's Exhibits 61, 62 and 63. Can you identify those records, first of all?

A Yes.

Q Are those the records that you brought today?

A Yes, they are.

Q What are those records, first of all?

A The form itself is an information certification regarding license to carry firearms and what do you want to know, what it's used for?

Q Yes.

A What it's used for is to determine whether an individual is or is not licensed to carry a firearm in Pennsylvania.

Q Are these records also sealed?

A Yes, they are.

Q And who sealed it?

A I did.

Q Who is the witness that signed it?

A The witnesses that signed it the Commissioner Daniel Dunn, State Police Commissioner and the Director of Records and Identification Division, Captain Warren Shafer.

MR. SCHWABENLAND: I would offer into evidence Government's Exhibits 61, 62 and 63.

MR. BEIER: I would like the opportunity to cross examine the witness regarding that document before I would agree to its admission.

THE COURT: Well, go ahead.

VOIR DIRE EXAMINATION

BY MR. BEIER:

Q Mr. Litzenberger, this document was not prepared by you, is that correct?

A This document was prepared by me.

Q It was prepared by you. Fine.

On this document is there a place -- the name is Howard Blum, is it not?

A Yes.

Q And regarding the Social Security Number I see in there UNK. What does that mean?

A Unknown.

Q How do you know that the Howard Blum indicated here on your form is the Howard Blum that's here today? Is there any other way that you can identify him if there's no Social Security Number?

A No, there's not.

Q What about his date of birth? Would that assist you?

A It would assist me in making a search of the file.

Q And the date of birth you have on this form for Howard Blum is what?

A November 2nd, 1938.

Q And his age on this form is what?

A 40.

MR. BEIER: Thank you. I have no further questions.

Your Honor, based on this testimony, I would object to the admission of this record because it doesn't identify my client. That's not my client's date of birth. That's not his age and it's over six years off and there's no --

THE COURT: Let me see the document. I haven't seen it.

(Exhibit was handed to the Court.)

THE COURT: We have nothing in the record concening your client whatsoever. This is an official document. It's been identified as having been prepared by this officer. The objection is overruled. It will be received.

(Exhibit was returned to the clerk.)

THE COURT: Any other objections? 61 and 62 and 63 will be received.

MR. SCHWABENLAND: If I might have one second, Your Honor.

(Pause)

MR. ZIMMERMAN: Your Honor, even though you have received those, I'd like to make an objection for the record concerning Mr. Eckman because the document has no Social Security number on to identify him other than the name.

THE COURT: Objection is overruled.

MR. WHITE: I would join in that objection also,

Your Honor, on behalf of Mr. Machi.

THE COURT: All right, it's overruled as well.

DIRECT EXAMINATION (Cont'd.)

BY MR. SCHWABENLAND:

Q Trooper, let me ask you a question. Did you yourself do a search on named individuals?

A Yes.

Q When you do a search, how do you go about doing a search?

A Well, the license to carry in the provisional firearm registration is all computerized and we have a computer index and we make an inquiry into the computer by the name and date of birth.

Q Did any name appear in the name of Howard Blum?

A No.

Q No name would appear up?

A (Nodded)

Q If you had put in the name Howard Blum, would the name Howard Blum appear on the computer itself?

A Only if there was a record.

Q And so when you put the name Howard Blum into the records, are you testifying that no name by the name of Howard Blum came up?

A Right.

Q And that by not coming up, what does that mean?

A That means that there's nothing in the file on Howard Blum.

Q So Mr. Blum would not have a permit to carry any firearms.

A Correct.

Q Concerning Government Exhibit No. 61, you made a search of the files on Peter J. Machi.

A Correct.

Q And Peter J. Machi what did you determine?

A He was not issued a license to carry. There was nothing in the file on him.

Q And on Government Exhibit No. 62 in the name of Howard -- I'm sorry. Howard Blum was 62. Peter Machi was 61 and James Eckman Exhibit No. 63. What was your determination as to James Eckman?

A No record.

Q And when you say no record, how long has this gone on? How long do you have to have a permit for or how long can you have a permit for?

A A license to carry would be valid for one year from the date it was issued.

Q So you made a check when?

A Last night.

Q And you made a check by putting in those three names?

A Correct.

Q And by not coming up, they would not have had a

permit on August 7th, 1979?

A Correct.

MR. SCHWABENLAND: I have nothing further.

CROSS EXAMINATION

BY MR. BEIER:

Q Did information that's on there where did that come from in terms of the age, date of birth?

A The information on the -- That came from the U.S. Attorney's office.

Q So that all the information on there was provided by the U.S. Attorney's office.

A Right.

MR. BEIER: Thank you. No further questions.

CROSS EXAMINATION

BY MR. ZIMMERMAN:

Q Trooper, how far back did your computer go?

A We started this system back in it I believe was January 1976.

Q So that there -- I guess that there is in the computer every licensee from '60 -- what was it?

A '76.

Q From '76 to date.

A Right.

Q How about before that?

A Prior to that we had a manual file and a record to

license to carry and permit was purged.

Q When you punched into your computer for James Eckman, did any Eckmans come out at all?

A No.

Q None whatsoever?

A Not to my knowledge. There was no James Eckman.

Q Are you able to just put in a name without a date of birth and Social Security number?

A No. You must inquire with the name, date of birth.

Q So that if the date of birth would be erroneous, then your search would not be accurate.

A Possibly, yes. The computer, if I might explain, the computer is designed and programmed to search on either side a period of two years from the date of birth. Currently, the license to carry the date is not required on the license, therefore, we have to compute the individual's age which is on the license to the year, date of birth and it gives a two year way both ways.

Q Did you do one of these searches for Aedan McCarthy?

A Yes.

Q If one would apply for a license today in Allegheny County; in other words, if it was granted today, how long would it be before it was put into the computer?

A Well, the issuing authority has seven days to send a license to the headquarters of the State Police and it's put

in daily. They're entered as we receive them.

Q There's a seven-day lapse?

A Correct.

MR. ZIMMERMAN: That's all I have. Thank you.

CROSS EXAMINATION

BY MR. WHITE:

Q Sir, on the information that's given on Peter J. Machi, it lists his age as 41, is that correct?

A Correct.

Q And its date of birth is 11/2/38, is that right?

A Right.

Q 11/2/38 would not make the man 41, is that correct? It would make him 40.

A Correct.

Q So the information on the identification data is incorrect, is that correct?

A Well, the age was computed from the year he was born.

Q Okay, but the data is incorrect when it says that he was 41, is that correct?

A It's incorrect here, yes.

MR. WHITE: Very good. Thank you.

THE COURT: Anything else, gentlemen?

MR. SCHWABENLAND: Just one second, Your Honor.

(Pause)

REDIRECT EXAMINATION

BY MR. SCHWABENLAND:

Q Did you find anything else on Peter J. Machi in making your search?

MR. WHITE: Objection, Your Honor, beyond the scope of the cross.

THE COURT: I think I'd better sustain the objection. As I understand it, these records merely show that there's no license issued to these men to carry firearms and I don't know that we ought to get into any other thing that they show.

MR. SCHWABENLAND: Fine, Your Honor.

THE COURT: We'll sustain it unless you tell me up here what it is you want to bring out and find out if it's objectionable.

MR. SCHWABENLAND: No. That's fine.

THE COURT: All right.

MR. SCHWABENLAND: I have nothing further of this witness.

MR. WHITE: Your Honor, I'd move that the documents after this cross examination relating to the data and how important it is that it be correct that your Honor reconsider your ruling and strike this witness's testimony and not admit these documents.

THE COURT: No. That motion is denied. These

documents relate only to whether there's a license to carry a firearm.. They'll be received.

Anything else?

MR. SCHWABENLAND: Nothing, Your Honor.

THE COURT: All right.

(Witness excused.)

MR. SCHWABENLAND: I would move the admission I think it was admitted but I'm not sure Government Exhibit No. 24 which are the 38 shells that were identified by Mr. McCarthy.

THE COURT: Just a moment. I'll check.

What's your record show, Mr. Duffy?

THE CLERK: They started to write an "a". I'm not saying it is admitted.

THE COURT: Just a moment.

(Pause.)

THE COURT: It's been received. That was the ammunition for the 38 pistol.

MR. SCHWABENLAND: Yes, it was and also Government Exhibit No. 30, the plastic bag containing the locks from Cauley Armored Car.

THE COURT: What's your record show, Mr. Duffy?

THE CLERK: I do not have it admitted.

THE COURT: It will be received.

MR. SCHWABENLAND: If I might have one second Your Honor.

(Pause)

(Continuing) May we approach side bar?

THE COURT: Yes.

(At side bar.)

MR. SCHWABENLAND: I will state for the record that I am done except for one thing.

MR. WHITE: Excuse me. Would you keep your voice down. I think the jury can hear you.

MR. SCHWABENLAND: I'll state for the record I am done except for one ~~thing.~~ The certified copies that were introduced concerning the named individuals as to Mr. Eckman and to Mr. Machi, those were the correct date of births. As to Mr. Blum, that was an incorrect date of birth. I would only reserve the right -- Mr. Blum is an Ohio resident. I would only ask that I may recall the trooper's going to check it out unless there could be a stipulation that a Howard Blum with the correct date of birth was not registered in the State of Pennsylvania.

MR. BEIER: There is no stipulation. I would object to that witness being recalled.

THE COURT: Well, as I understood it, he said that there was no Blum at all that turned up as licensed to carry a firearm. This is a very small point in the overall scheme of things. As I understood the witness, he said that there was no Blum turned up whatsoever on the computer.

MR. SCHWABENLAND: That's correct.

THE COURT: And I don't know if it makes any difference what his date of birth is. As I understand it, if he runs it back through the computer with the correct date of birth, he's going to get the same answer. Now if Mr. Beier tells me that Blum has a license to carry a pistol, I'm certainly going to make you research your records but I don't think Mr. Beier is going to state that.

MR. BEIER: No, I'm not, Your Honor, and I cannot enter into any stipulation. My client would not agree to that.

THE COURT: Well, I don't see any point in holding up the trial any further just to have another run made on this computer to see if Mr. Blum has a license to carry a pistol because the witness has already testified that he doesn't. At least he found nothing in the computer. It's up to you gentlemen if you want to hold the record open and have him run his computer again, I suppose you can do it but the record is pretty clear that they found no license for Blum and Mr. Beier is not representing that he has one.

MR. SCHWABENLAND: The only trouble is -- Well, it's no trouble. It's just that my understanding that the law at least in Pennsylvania requires the prosecution to prove beyond a reasonable doubt and as long as there's no problem with that, then I'll rest but basically it is a small point and if --

THE COURT: Well, if it will make you feel any better, I think the evidence is sufficient that there's no licenses issued to these men to carry firearms.

MR. SCHWABENLAND: Fine.

THE COURT: That's the state of the record at this time.

MR. SCHWABENLAND: Fine.

THE COURT: All right.

(In open court.)

MR. SCHWABENLAND: At this time, the Government rests, Your Honor.

THE COURT: Mark the testimony closed for the Government.

Take about five minutes, ladies and gentlemen. Give you a short recess at this time then we'll resume.

(The jury was recessed.)

THE COURT: All right, gentlemen, make your motions quickly and let's get on here.

MR. ZIMMERMAN: If I could do mine first, Your Honor, Mr. Beier has a few things to put together.

THE COURT: All right, go ahead.

MR. ZIMMERMAN: I would make a motion for judgment of acquittal on both Counts 1 and 2 on behalf of Mr. Eckman and indicate to the Court that on Count 2 the testimony from Mr. McCarthy indicated that Mr. Eckman specifically stated that

A That's the date that the typist types it. The date that it's dictated is here. That's the date on which it occurred.

Q And it was dictated 8/7/79?

A That's correct.

Q That was the day of the arrest?

A That's correct. Actually I'm sorry. The date is dictated 8/15. The date of the arrest is 8/7.

Q I wonder if you could turn to Page 2 and what does it indicate there in terms of Mr. Blum's birthdate?

A 10/10/45.

Q And that would make him 34 years old, would it not?

A Without sitting down to figure it, approximately, yes.

Q Thank you. I'd like to show you now a complaint and ask you if you can identify the complaint.

A That bears my signature.

Q And would you look at the last page of that complaint? Does that also have your signature?

A Yes, it does.

Q How many pages is that complaint?

A Counting the cover page?

Q Yes.

A Five.

REDIRECT EXAMINATION

BY MR. SCHWABENLAND:

Q Is there any special day of the week that you usually transport money?

A Usually it's Tuesday.

MR. SCHWABENLAND: Thank you. I have nothing further.

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BY MR. WHITE:

Q But it can be any day, is that correct?

A Yes, it can be any day but it's usually Tuesday.

MR. SCHWABENLAND: I have nothing. May the witness be excused?

THE COURT: Yes.

(Witness excused)

RAYMOND J. LITZENBERGER

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A Approximately nine years.

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A Yes.

Q And did you bring with you certain records today?

A Yes.

Q Let me show you Government's Exhibits 61, 62 and 63. Can you identify those records, first of all?

A Yes.

Q Are those the records that you brought today?

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BY MR. BEIER:

Q Mr. Litzenberger, this document was not prepared by you, is that correct?

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Q It was prepared by you. Fine.

On this document is there a place -- the name is Howard Blum, is it not?

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Q And regarding the Social Security Number I see in there UNK. What does that mean?

A Unknown.

Q How do you know that the Howard Blum indicated here on your form is the Howard Blum that's here today? Is there any other way that you can identify him if there's no Social Security Number?

A No, there's not.

Q What about his date of birth? Would that assist you?

A It would assist me in making a search of the file.

Q And the date of birth you have on this form for Howard Blum is what?

A November 2nd, 1938.

Q And his age on this form is what?

A 40.

MR. BEIER: Thank you. I have no further questions.

Your Honor, based on this testimony, I would object to the admission of this record because it doesn't identify my client. That's not my client's date of birth. That's not his age and it's over six years off and there's no --

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(Exhibit was handed to the Court.)

THE COURT: We have nothing in the record concening your client whatsoever. This is an official document. It's been identified as having been prepared by this officer. The objection is overruled. It will be received.

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THE COURT: Any other objections? 61 and 62 and 63 will be received.

MR. SCHWABENLAND: If I might have one second, Your Honor.

(Pause)

MR. ZIMMERMAN: Your Honor, even though you have received those, I'd like to make an objection for the record concerning Mr. Eckman because the document has no Social Security number on to identify him other than the name.

THE COURT: Objection is overruled.

MR. WHITE: I would join in that objection also,

THE COURT: Finish up and then I'll let Mr. Schwabenland be heard for a minute if he wants to be.

MR. WHITE: That's our argument on Count 2, Your Honor.

THE COURT: All right. Do you want to say anything, Mr. Schwabenland?

MR. BEIER: I'd like to make my motion, Your Honor.

THE COURT: All right, go ahead, Mr. Beier.

MR. BEIER: I'd first like to join in the motions made by Mr. Zimmerman and Mr. White on behalf of Howard Blum as opposed to repeating what they have said. In addition, I'd like to make a motion now that the Government has closed for the Brady material under Brady versus Maryland. I would ask that any exculpatory information that applies to Howard Blum be turned over to us and specifically I'm concerned about credibility of any of the witnesses would have testified whether there's any material, impeachment material and most importantly any information regarding entrappment. After some research and looking into the United States versus Verells, 287 435 and Sherman versus United States, it's my understanding that the testimony that Mr. McCarthy brings Howard Blum into this conspiracy at the same time he brings Robert Eugene Mercier also known as Gene and we believe that the evidence is sufficient to show under the present state of the record that this man identified as Gene, Mr. Robert Mercier may in fact

have been the informant and may have in fact entrapped my client Howard Blum and, therefore, I call upon the Government to identify this individual if that is in fact true because I think that we would meet the test as applied in those particular cases.

THE COURT: You would be what? I can't hear you very well.

MR. BEIER: I believe that there's two-pronged tests in both Verrell and Sherman and I think the facts as I know them from the present state of the record are sufficient if Mr. Mercier were brought in to show that my client was brought into this scheme by Mr. Mercier and, therefore, he was entrapped and a defense of entrappment we believe can only be asserted if that individual was brought in.

THE COURT: I think you're not talking very clearly but go ahead and finish your motion and I'll let Mr. Schwabenland reply.

MR. BEIER: Then I'd like to make a motion for judgment of acquittal regarding Count 1 regarding the conspiracy. We believe the evidence showed that Mr. McCarthy testified that on Tuesday, August the 7th that that plan to rob that armored car on that particular day was abandoned. I further asked him whether he had met with the other alleged co-conspirators to discuss another time or meeting place and he said no, of course not because he was arrested. He went on

to say that he believed that it was going to be done the following Tuesday but I don't believe the record shows that that thought of his was conveyed to the other co-conspirators and I don't believe, therefore, that that case has been made out in terms of conspiracy. I also believe in the same Count that there's no evidence, not sufficient evidence to show that the funds were insured by the FDIC; that the evidence submitted was incompetent because it was a photocopy and there was no proper foundation laid to introduce the photocopy by the Government.

Regarding Count 2, I would ask again for a judgment for acquittal regarding that Count because I also believe that Count was not made out. No. 1 regarding Mr. Blum I don't believe that the witness who testified today, Mr. Litzenberger who introduced and the Court received a record that apparently had a seal on stating that Mr. Blum was not licensed to carry a firearm in the State of Pennsylvania. I don't believe the case is made out because the witness further stated those records are inaccurate if the date of birth is more than two years off. Accordingly since it was more than two years off, they have not made out a prima facie case in terms of unlawfully carrying the firearm.

I further might add that Mr. Blum -- Other than Mr. McCarthy's evidence and if the Court decides to believe or not believe that he had no gun on his person and it's not clear

and we'll charge them early Monday morning and they'll be here all day Monday and they should be able to come to a verdict fairly promptly.

Anything else, gentlemen?

MR. ZIMMERMAN: Yes, Your Honor. I have a couple of motions I'd like to make. I'd like to renew my motion for judgment of acquittal on both counts that I made at the conclusion of the Government's case. Additionally I have a motion to dismiss both of the counts against Mr. Eckman not in the form of a judgment of acquittal but in the form of an outright dismissal. The reason for my motion for dismissal and the basis of it is when we look at all the testimony that has been elicited and the motion to suppress as well as during the trial, we find that there is an informant in this case and I think that we must reasonably infer that the informant is this fellow named Gene because of the Government's reluctance to even give up his address. The FBI was given information beginning on the 19th of July concerning the activities of the defendant Eckman and all the defendants in this case. The resultant function of this fellow by the name of Gene and the overall conspiracy was that he was a locksmith and that he was the one who in fact manufactured the keys that would permit the defendants to enter the armored car if they had gone through with what the Government alleges they planned to do. Without Gene's participation in the manufacturing of the keys, any

agreement that any of the defendants may have come to together would be impossible to carry out because there was no way that they would be able to continue their plan without being able to enter the armored car. It would seem to me that starting on the 19th of July that Gene was in fact an agent of the Government and that the Government itself was a member of this conspiracy and in fact committed several burglaries to obtain the keys and manufactured the keys and as a result of that, I would submit that this is certainly not on all fours with the case of United States versus Russo and Ellsberg which was dismissed for a similar reason but it is akin to that in that the Government through its agent was not only gleaning information from people who engaged in a conspiracy but were doing separate and distinct illegal acts to make the conspiracy possible and without the Government's participation the goal of this conspiracy would never have been able to be reached and as a result of that, I would submit that that's a gross investigatory impropriety on the Government's part demanding a dismissal of both of the counts against Mr. Eckman.

MR. WHITE: I would on behalf of Mr. Machi join in that motion, Your Honor, and furthermore, state that had we been able to ascertain the whereabouts we may have been able to amplify and put evidence on concerning the allegations that Mr. Zimmerman has made on the record but for reasons unbeknownst to the defense attorneys, we have not been given

that address or been able to get to Gene to find out what the background facts were but it does appear that as Mr. Zimmerman said that without Gene this thing could -- this alleged conspiracy, the object of it could not have been carried out and in addition to the burglary to get the locks was the stealing of the cars that couldn't have been accomplished without Gene and it does appear that the informant, assuming it was Gene, was working with the authorities on July 19, 1979.

MR. BEIER: Defendant Howard Blum would join in that. Additionally add that Defendant Blum never having been brought into this conspiracy since it appears on the record that he came in at the same time this Gene came to the record of Robert Eugene Mercier.

THE COURT: Anything else, gentlemen?

MR. BEIER: I just have one additional motion that I would renew my objection to the chart Mr. Schwabenland drew which I believe was sustained, however, the chart throughout this trial has remained in view of the jury and the particular page that is exposed has my client's name on it and in view of the fact that that was to have ceased and desist, it has not been removed and, therefore, I believe my client has been prejudiced by that.

MR. WHITE: I would join in that motion also, Your Honor.

THE COURT: What's the motion? He said he believes his client is prejudiced but I don't have any motion.

MR. BEIER: Motion for a judgment for a mistrial based on that.

THE COURT: Let me deal with the motions in order. The motion for judgment of acquittal is denied which was made by Mr. Zimmerman joined in by the other counsel. The motion to dismiss the indictment is denied joined in by all three defense counsel. The motion for mistrial is denied.

MR. WHITE: Your Honor, may we have the pages that have been hanging up in the courtroom taken down and made a part of the record for purposes of showing it to the Court of Appeals?

MR. ZIMMERMAN: If necessary.

THE COURT: Certainly you can make the pages part of the record if you want to.

MR. SCHWABENLAND: I would just ask permission of the Court to use those pages and other diagrams which have been identified as illustrative points in my closing to the jury purely as illustration.

MR. BEIER: I would object to that. It compounds the --

THE COURT: I'll deny that motion. The record is clear enough. I have gone through it. The dates can be remembered and specific times where necessary.

Form A. O. 91 (Rev. 12-1-43) Complaint

United States District Court
FOR THE

UNITED STATES OF AMERICA v Howard Gregory Blum James Donald Eckman Peter J. Machi Aedan Charles McCarthy	Magistrate's Docket No. Case No. 79 227 COMPLAINT for VIOLATION of U.S.C. Title 18 Section 371

BEFORE Robert Mitchell, _____
Name of Magistrate — Address of Magistrate

The undersigned complainant being duly sworn states:

That between July 19, 1979 and August 7, 19 , at Richland Township, in Allegheny County in the

Western District of Pennsylvania and elsewhere

(1) Howard Gregory Blum, Peter J. Machi, James Donald Eckman, Aedan Charles McCarthy

did(2) willfully and knowingly conspire, combine, confederate and agree together and with one another and with others both known and unknown to commit offenses against the United States to wit: violations of Title 18, U.S.C., Section 2113. That is they did conspire to take and carry away with intent to steal or purloin money exceeding $100, belonging to and in the care, custody and control of various Pittsburgh Banks, including Mellon Bank, Equibank, Union National Bank, said banks being insured by the Federal Deposit Insurance Corporation.

And the complainant states that this complaint is based on

See attached affidavit.

And the complainant further states that he believes that

are material witnesses in relation to this charge.

Leonard M. Pedreira
Signature of Complainant
Special Agent, FBI
Official Title

Sworn to before me, and subscribed in my presence, May 7, 1979

Edward C. Bunstein
United States Magistrate

(1) Insert name of accused.
(2) Insert statement of the essential facts constituting the offense charged.

COMPLAINT

I, Leonard M. Pedreira, being duly deposed sworn, and says:

1. I am a Special Agent employed with the Federal Bureau of Investigation, and as such, am assigned to investigations of violations of the United States Federal Code including Title 18, USC, Sections 371 and 2113.

2. On or about July 19, 1979, the Federal Bureau of Investigation received information concerning an alleged robbery of an armored car number twelve, owned and operated by Cauley Armored Car Company, Inc., 1616 Main Street, Sharpsburg, Pennsylvania. This alleged robbery was to occur on Cauley's Butler run.

3. On July 23, 1979, I contacted Coleman McGivern, President of Cauley Armored Car Company, Inc., who advised me that armored car number twelve transports in excess of $200,000 on its Tuesday runs from the major banks in Pittsburgh to the Butler branches and an equal amount on their return trip. These banks include, among others, Equibank, Mellon Bank, and Union National Bank. All this money is insured by the Federal Deposit Insurance Corporation. McGivern further advised that his armored car number 12 only carried a substantial sum of $200,000.00 on Tuesdays; all other days were of a lesser amount.

4. On July 24, 1979, a Tuesday, at 11:05 AM, I observed a white GMAC Van, registered to Peter J. Machi, Pennsylvania license 741-97Y, slowly drive pass Cauley's location in Sharpsburg. This van contained two white males. On July 24, 1979, later that afternoon, a surveillance was conducted of car number 12 on its Butler run, at which time the armored car was observed to stop at the Valencia Lounge, Valencia, Pa. The armored car drivers left the vehicle unattended and entered the lounge.

Shortly thereafter, James Donald Eckman and another unidentified white male were observed driving the green and white van owned by Peter J. Machi passed the Valencia Lounge twice, after which he returned to the parking lot of the Uncle Charlie's Restaurant, located approximately one-half mile away.

On July 31, 1979, a Tuesday, a surveillance by the Federal Bureau of Investigation, Pittsburgh, revealed that James Donald Eckman met with Peter J. Machi and Aedan Charles McCarthy in the parking lot of Uncle Charlie's Restaurant, located south of the Valencia Lounge. Following a short discussion, Peter J. Machi and Aedan Charles McCarthy entered the white van belonging to Peter J. Machi with the license number 741-97Y, and proceeded to the Valencia Lounge where Peter J. Machi entered the lounge while Aedan Charles McCarthy waited in the van. James Donald Eckman also proceeded from Uncle Charlie's Restaurant to the Valencia Lounge in another vehicle and entered the lounge. The van occupied by Peter J. Machi and Aedan Charles McCarthy parked two vehicles away from Cauley vehicle number twelve. During this time, the drivers of armed car twelve were seated inside the lounge at the bar. Both Peter J. Machi and James Donald Eckman left within minutes of their arrival.

6. On August 6, 1979, a Tuesday, a surveillance of armored car twelve revealed that it stopped at the Valencia Lounge at approximately 2:00 PM and both drivers entered the building. Prior to the arrival of the armored car, Peter J. Machi was observed driving a vehicle into the parking lot of the Valencia Lounge. He was followed into the parking

lot by a 1979 Ford Bronco driven by Aedan Charles McCarthy. Upon parking his vehicle, Peter J. Machi entered the vehicle of Aedan Charles McCarthy, and they departed the Valencia Lounge parking lot. This vehicle had a a Pennsylvania license plate number CL58638. Investigation has determined that this license plate did not belong to this vehicle and was stolen. Surveillance also revealed that a white van, 1978 Ford Econoline 150, Pennsylvania license CC10304, which later proved to be a stolen license plate, made several passes of the Valencia Lounge by an unidentified individual. Shortly thereafter, the 1979 Ford Bronco with two occupants re-entered the parking lot of the Valencia Lounge and slowly perused the vicinity in which Cauley vehicle number twelve was parked. Within a short period of time, the Bronco re-entered the Valencia Lounge parking lot with Aedan Charles McCarthy and Peter J. Machi, at which time Peter J. Machi left the Bronco and entered the white Ford he had arrived in initially. Both vehicles left the Valencia Lounge and proceeded to the parking lot of Uncle Charlie's Restaurant on Route 8, which is located approximately one-half mile south of the Valencia Lounge.

7. Subsequent investigation had determined the following: (a) James Donald Eckman is presently on federal probation for Theft From Interstate Shipment; and (b) Aedan Charles McCarthy had been released within the last year on conditional release from federal prison on armed bank robbery conviction. Based on the past criminal history of the above two individuals and in view of the fact that they were in vehicles bearing stolen license plates, a decision

was made at that time to follow the Bronco driven by Aedan Charles McCarthy and the 1965 Ford driven by Peter J. Machi. Upon arrival at the parking lot of Uncle Charlie's Restaurant, James Donald Eckman, Peter J. Machi, Aedan Charles McCarthy, and an individual later identified as Howard Gregory Blum were observed to meet in the immediate vicinity of the white Econoline van, the 1979 Bronco, and the 1965 Ford. Upon the arrival of the Agents of the Federal Bureau of Investigation, they announced their identity, at which time the above individuals were told they were under arrest. Following this, Howard Gregory Blum attempted to flee on foot and James Donald Eckman entered the 1979 Bronco and made attempts to leave. All four individuals were apprehended at that point.

Leonard M Bedrosian
special agent, FBI

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CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 79-138
	)	
HOWARD GREGORY BLUM	)	(18 U.S.C. §§371 and 924(c))
JAMES DONALD ECKMAN	)	
PETER J. MACHI	)	
AEDAN CHARLES McCARTHY	)	

The Grand Jury charges:

That from on or about May 1, 1979, and continuing thereafter up to and including August 7, 1979, in the Western District of Pennsylvania and elsewhere, HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY, the defendants herein, wilfully and knowingly did combine, conspire, confederate, and agree together and with others whose names to the grand jury are known and unknown, to commit an offense against the United States, to wit, a violation of Title 18 United States Code, Section 2113(b), that is HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY wilfully and knowingly did combine, conspire, confederate, and agree together and with others whose names to the grand jury are known and unknown, to take and carry away, with intent to steal and purloin, money exceeding $100.00, belonging to and in the care custody, control, management and possession of The Union National Bank of Pittsburgh, the deposits of which were then insured by the Federal Deposit Insurance Corporation in violation of Title 18 United States Code, Section 2113(b).

2. It was a part of the conspiracy that HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY

planned to take and carry away money from armored car #12 of the Cauley Armored Car Company, Inc. on its Tuesday route which proceeds from the major banks in Pittsburgh, Pennsylvania to the Butler, Pennsylvania branches and back again to Pittsburgh; said day being the day that armored car #12 transports in excess of $200,000.00.

3. It was further a part of the conspiracy that HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY planned to take and carry away money from armored car #12 while it was parked outside the Valencia Lounge on Route 8 in Valencia, Pennsylvania.

4. It was further a part of the conspiracy that HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY made and caused to be made certain keys which would open the doors of and operate armored car #12.

5. It was further a part of the conspiracy that HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY obtained and caused to be obtained various weapons.

6. It was further a part of the conspiracy that JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY maintained and caused to be maintained surveillance over armored car #12 at the Valencia Lounge.

7. It was further a part of the conspiracy that HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY used and caused to be used lost, stolen, and fraudulently obtained license plates and vehicles, well knowing that said license plates and vehicles had been lost, stolen and fraudulently obtained.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts in the Western District of Pennsylvania and elsewhere:

1. In or about July, 1979, HOWARD GREGORY BLUM and JAMES DONALD ECKMAN traveled from Ohio to the Western District of Pennsylvania and met with PETER J. MACHI and AEDAN CHARLES McCARTHY.

2. On or about July 24, 1979, JAMES DONALD ECKMAN traveled to the Valencia Lounge, Route 8, Valencia, Pennsylvania, in a vehicle registered to PETER J. MACHI.

3. On or about July 31, 1979, JAMES DONALD ECKMAN met with PETER J. MACHI and AEDAN CHARLES McCARTHY in the parking lot of Uncle Charlie's Restaurant which is approximately 1 mile south of the Valencia Lounge.

4. On or about July 31, 1979, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY drove from the parking lot of Uncle Charlie's Restaurant to the Valencia Lounge.

5. On or about August 5, 1979, HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY took and caused to be taken one (1) 1979 Ford Bronco and one (1) 1978 Ford Econoline, 150 van, from German Motors, Latrobe, Pennsylvania, well knowing at the time, that said vehicles were not authorized to be taken by them.

6. On or about August 7, 1979, HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY traveled to the vicinity of the Valencia Lounge for the purpose of taking money from armored car #12.

7. On or about August 7, 1979, HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY used and caused to be used the 1979 Ford Bronco and the 1978 Ford Econoline, 150 van in and around the Valencia Lounge.

8. On or about August 7, 1979, HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY carried and caused to be carried the following firearms, with each firearm being a separate overt act:

(a) one (1) .30 caliber Carbine M-1, Serial No. 3225789;

(b) one (1) .357 caliber Smith and Wesson, Model 19, 6 inch barrel, Serial No. K777747;

(c) one (1) .38 caliber Smith and Wesson, Model 36, Serial No. 4J6286

9. On or about August 7, 1979, JAMES DONALD ECKMAN and AEDAN CHARLES McCARTHY possessed keys which opened and operate armored car #12.

In violation of Title 18 United States Code, Section 371.

SECOND COUNT

The grand jury further charges:

That on or about August 7, 1979, in the Western District of Pennsylvania, HOWARD GREGORY BLUM, JAMES DONALD ECKMAN, PETER J. MACHI and AEDAN CHARLES McCARTHY, all defendants herein, wilfully and knowingly carried firearms unlawfully during the commission of a felony prosecutable in a court of the United States, that is, a conspiracy to take and carry away with intent to steal and purloin money exceeding $100, belonging to and in the care, custody, control, management and possession of the Union National Bank of Pittsburgh, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Section 371.

In violation of Title 18, United States Code, Section 924(c).

A true bill,

Dorothy E Wells
Foreman

Robert J. Cindrich
ROBERT J. CINDRICH
United States Attorney

the FBI had obtained permission from German Motors?

A Yes, sir; we did.

MR. SCHWABENLAND: I have nothing further.

THE COURT: All right. Now, I will let you gentlemen cross examine in the order in which the Defendants' names appear on the indictment. First, Blum. Mr. Beier.

CROSS EXAMINATION

BY MR. BEIER:

Q Mr. Pedreira, the first time you received any information was on July 19?

A That is correct.

Q You didn't receive any information in May or June about this particular --

A No, I did not.

Q -- conspiracy?

A No.

Q Had there been an investigation begun before July 19?

A Not to my knowledge.

Q When you said you received information regarding four gentlemen, were you given the names of these four gentlemen, back on July 19?

A I was given Mr. Blum's name, Mr. Eckman's name, a gentleman named Pete, who owned a van with the license number, and a gentleman named Mac.

Q And that was all on July 19?

A Yes, sir.

Q You said you made, prior to the arrest, two surveillances that you called dry runs. Did you see Mr. Blum there on either of those occasions?

A Not on the 24th or 31st; no, I did not.

Q Did any other member of the FBI, to your knowledge, see Mr. Blum on those dry runs?

A No, sir.

Q Do you have any knowledge that Mr. Blum met with any other individuals in July of '79, in the Pittsburgh area?

MR. SCHWABENLAND: I object to that question, Your Honor.

THE COURT: The reason?

MR. SCHWABENLAND: The reason is that it -- I will relate to the Court that the investigation is continuing, and it is not relevant to this information, the information concerning probable cause by the agent, concerning the surveillance on the two days, plus the arrest on August 7, 1979.

THE COURT: Well, your reason is that this is attempting to get into discovery that is not really relevant to the probable cause issue?

MR. SCHWABENLAND: Yes, Your Honor.

THE COURT: I think that is right. The issue before me right now is whether or not there was sufficient probable cause to make these arrests and the searches incident to them. The objection is sustained.

BY MR. BIER:

Q Regarding any of the other surveillances that you made, I believe you said on the 23rd --

A Twenty-fourth.

Q Well, on the 23rd, weren't you at the Valencia Lounge? Am I correct in that?

A You are correct on that, but I was at the Valencia Lounge on the 24th.

Q There was no surveillance on the 23rd?

A There was a surveillance in the late hours of the 23rd and the early hours of the 24th.

Q Was Mr. Blum seen by anybody at that time?

A No, sir; not by me.

Q By anyone else, to your knowledge?

A No, sir.

Q And he was not inside the Valencia Lounge on the 24th, when you were there on that day; was he?

A No.

Q Did you find any keys on Mr. Blum that fit the armored car vehicle number twelve, either the ignition or the door or the rear vault?

A No, we did not.

Q Did you find any weapons on him?

A On his person?

Q Yes.

A No, I did not.

Q Do you recall testifying, earlier in this case, at the bond reduction hearing?

A Which bond reduction hearing are you referring to?

Q For Mr. Blum, I am referring to.

A I testified at his bond reduction hearing, but I don't know what you are referring to.

Q But you do recall testifying?

A I did testify at his bond reduction hearing; yes, sir.

Q Now, you earlier, I believe, said, earlier today, Mr. Blum was in a vehicle with Mr. Eckman on the day of the arrest, August the 7th; is that correct?

A That is correct.

Q Did you personally see him in that vehicle?

A He was seen by Special Agent James Garcia.

Q You did not see him?

A No, sir; I did not.

Q You did not see him in any vehicles, this day or any other day?

A I did not see him personally; no.

Q Do you recall, at the bond hearing, telling us that the person identified with Mr. Eckman was actually unidentified, and Mr. Blum was not seen in any vehicles, to your knowledge?

A At the time I testified, I was not aware of the fact exactly who was -- I was under the impression that individuals were in certain cars, but, as all the paperwork came forth from all the agents who were present on the day of the apprehension, I was made aware of who was where and who was in what vehicle, but I did not have that information at the time I testified prior.

Q You did say he was unidentified. Did you know the individual who was with Mr. Eckman in the car?

A At the time, to my knowledge, he was, as I said, as I received the reports from the agents on the scene, by that, I was able to determine who was where.

Q When did you receive this information about Mr. Blum?

A Subsequent to the bond hearing.

Q At the time the complaint was sworn out by you and the initial arrest of Mr. Blum and the other three Defendants was made, I take it that all the information in the complaint was all the information you had at that time; that is, the information upon which you based your arrest and

the probable cause for the arrest?

A At the time that complaint was made, it was made to the best of my knowledge at that time.

Q And in that complaint, you never identified Mr. Blum, did you, as being in any vehicle?

A If you wish to let me read the complaint, I will recall what was in it. I don't know the exact wording of the complaint.

(The witness was furnished a document, which he examined.)

THE WITNESS: Thank you.

Now, your question is whether or not Mr. Blum was named as being in any of the cars?

BY MR. BIER:

Q Correct.

A On what specific day, the 7th?

Q Any day.

A This complaint does not state Mr. Blum was an occupant of any particular car on any particular day.

Q In fact, this complaint is five pages long; is it not?

A That is correct.

Q And would it be fair to say that the only place Mr. Blum's name is even mentioned is on the very last paragraph on the last page, wherein it says he was observed

to meet, in the immediate vicinity of the Econoline and Bronco, with three other individuals?

A He is mentioned on the last page; yes.

Q That is the only place his name is even mentioned, and the only mention is he was meeting with these three individuals on the day of the arrest?

A Well, it mentions, further down,, he attempted to flee.

Q The very last line?

A Yes.

Q After the arrest?

A When he was advised he was under arrest, he attempted to flee. Yes.

MR. BEIER: I have no further questions at this time.

THE COURT: All right.

Mr. Zimmerman, are you next, here?

MR. ZIMMERMAN: Thank you, Your Honor.

BY MR. ZIMMERMAN:

Q Agent, did you tell us that, on July 19, you were contacted by a person that you have recited as a confidential informant? Is that correct?

A Yes.

Q Was this a personal meeting or a telephone call?

AMENDMENT 4 UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 14 UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxes. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty -one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or

under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

18 U.S.C. (§371)

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. (§924 c)

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption of relief from disability under the provisions of this chapter, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than $10,000.00 or imprisoned not more than ten years or both.

(c) Whoever -

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, not withstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed

for the commission of such felony.

(d) any firearm or ammunition involved in or used or intended to be used in,a ny violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

28 U.S.C. (§1254 1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods;

(1.) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2.) by appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3.) by certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

AMENDMENT 5 UNITED STATES CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be de;rived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT 6 UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Nos. 80-5484 and 80-5491

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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HOWARD GREGORY BLUM, PETITIONER

v.

UNITED STATES OF AMERICA

PETER J. MACHI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to suppress guns found during a warrantless search of a duffle bag found in a stolen vehicle.

2. Whether the district court erred in conducting an in camera proceeding relating to disclosure of the address of an informant and in concluding that the government should not be required to disclose the address.

3. Whether the district court's instructions concerning withdrawal from the conspiracy were erroneous (No. 80-5484 only).

4. Whether there was sufficient evidence to sustain petitioner Blum's conviction on a firearms charge (No. 80-5484 only).

5. Whether there was probable cause for petitioner Blum's arrest (No. 80-5484 only).

OPINION BELOW

The judgment order of the court of appeals (No. 80-5484 Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1980. The petition for a writ of certiorari in No. 80-5484 was filed on October 1, 1980. The petition for a writ of certiorari in No. 80-5491 was filed on October 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners and co-defendant James Eckman were convicted of conspiracy to rob an armored car carrying bank funds, in violation of 18 U.S.C. 371 and 2113(b), and of unlawfully carrying firearms in the course of the conspiracy, in violation of 18 U.S.C. 924(c). Petitioners and Eckman were sentenced to consecutive terms of five years' imprisonment on the conspiracy conviction and three years' imprisonment on the firearms conviction. The court of appeals affirmed (No. 80-5484 Pet. App.).

The evidence at trial showed that in May 1979 petitioners, co-defendant Eckman, Eugene Mercier and Aedan McCarthy[1/] planned to rob a Cauley armored car company vehicle on its route through Monroeville, Pennsylvania. They subsequently decided, however, that that route offered little chance for success (Tr. 52-57).[2/] In July 1979, they turned their attention to another Cauley car (Number 12), following it on its route and observing that its drivers habitually stopped for a two-hour lunch at the Valencia Lounge (Tr. 58-66). They decided that the lunch stop

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1/ McCarthy testified for the government at trial pursuant to a plea bargain. He was sentenced to 18 months' imprisonment.

2/ "Tr." refers to the trial transcript. "S. Tr." refers to the transcript of the pretrial suppression hearing.

provided a good opportunity to rob the car and planned to commit the crime on Tuesday, August 7, 1979, when the car would be carrying a large amount of money (Tr. 83).

On July 20, 1979, petitioners and their cohorts went to the Cauley parking lot and made measurements of car Number 12 in order to make a device for unlocking the car (Tr. 66-69). They returned to the Cauley lot on several subsequent occasions to inspect the locks on armored car Number 12 and to test their keys (Tr. 77-83, 98-101).

On July 24, 1979, petitioner Machi, together with McCarthy, Mercier and Eckman, again followed car Number 12. On that occasion, FBI agents, who were receiving periodic tips about the planning of the robbery from an unidentified informant, observed petitioner Machi's van along the armored car's route, and an agent saw Eckman inside the Valencia Lounge inspecting the layout of the bar (Tr. 72-77, 215-225, 228-229). On Tuesday, July 31, 1979, while under FBI surveillance, petitioner Machi, McCarthy and Eckman met at Uncle Charlie's Restaurant parking lot, which was less than a mile from the Valencia Lounge. Eckman went to the lounge and waited inside. Machi and McCarthy, using Machi's van, followed car Number 12 to the lounge and parked next to it. Machi then followed the drivers inside the lounge. The three men returned to the restaurant about thirty minutes later (Tr. 101-105).

The next step in preparation for the robbery occurred on August 5, 1979, when petitioners, McCarthy, Eckman and Mercier stole a 1978 white Ford Econoline van and a 1979 red and silver Ford Bronco for use in the crime (S. Tr. 62-69; 105-108). On Tuesday, August 7, 1979, the day chosen for the robbery, petitioners, Eckman and McCarthy met at McCarthy's house. Petitioner Blum and Eckman arrived with an M-1 semi-automatic carbine, a police radio scanner and some walkie-talkies. McCarthy provided two pistols (Tr. 110-112).

After packing the weapons and other equipment in one duffle bag, the four men went to Uncle Charlie's Restaurant. Machi, who was driving his nephew's car, drove to the Valencia Lounge. Eckman followed in the Ford Bronco and brought Machi back to Uncle Charlie's. All four then traveled north of the Valencia Lounge in the Econoline van and waited for car Number 12 to pass. Meanwhile, Eckman put on a guard uniform (Tr. 115-119).

When the armored car passed, they followed it to the Valencia Lounge. The parking lot was particularly crowded, however, and the armored car had parked in the front rather than on the side as was customary. The van returned to Uncle Charlie's Restaurant, and Eckman and Blum went back to the lounge in the Bronco. After a few minutes, Eckman and Blum returned to Uncle Charlie's, and the group decided that they would have to wait until the following Tuesday when the armored car would again be parked on the side. Eckman drove Machi back to the lounge to get Machi's car (Tr. 120-121).

After Eckman and Machi rejoined the rest of the group at Uncle Charlie's, FBI agents arrested petitioners, Eckman and McCarthy. The agents confiscated the two stolen vehicles and transported them to a nearby county police academy (S. Tr. 78). There the FBI contacted the owner of the vehicles, German Motors, and obtained its consent to search them (S. Tr. 79). The search uncovered weapons and other instrumentalities of the crime in the duffle bag taken from the Econoline van (S. Tr. 80).

ARGUMENT

1. Relying upon Chadwick v. United States, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979), petitioners contend that the police acted unlawfully in searching the zippered duffle bag found in the stolen van. This contention is without merit.

In Chadwick and Sanders, this Court held that, as a general rule, a warrant is necessary to search luggage seized from an

automobile that the police have probable cause to believe contains contraband. The Court stated (Arkansas v. Sanders, supra, 442 U.S. at 764): "* * * a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations." Therefore, it concluded that a search warrant for luggage is necessary even if luggage is found in a vehicle subject to search under the automobile exception to the warrant requirement. These decisions, however, have no application to the instant case, where the van in which the duffle bag was located had been stolen by petitioners a few days before the planned robbery for use in the crime and the owner of the van had consented to its search.3/

First, the police acted lawfully in searching the bag. When police seize a stolen car, they are permitted to search it and its contents without a warrant. United States v. Zaicek, 519 F.2d 412, 414-415 (2d Cir. 1975). Moreover, it is undisputed that they had obtained the consent of the owner of the van to search the van and its contents. The scope of this consent certainly extended to the contents of an unlocked bag. See United States v. Boston, 508 F.2d 1171, 1178 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975). Cf. Frazier v. Cupp, 394 U.S. 731, 740 (1969).

In any event, petitioners had no privacy interest in the duffle bag sufficient to enable them to challenge its search. Petitioner Blum asserts no privacy interest whatsoever in the duffle bag; he relies (Pet. 14) on the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960), overruled in United States v. Salvucci, No. 79-244 (June 25, 1980). Peti-

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3/ For the same reason, petitioner Machi's suggestion that this case "points up" the alleged conflict between Arkansas v. Sanders, supra, and United States v. Milhollan, 599 F.2d 518 (3d Cir.), cert. denied, 444 U.S. 909 (1979), is erroneous. Milhollan, which this Court declined to review, involved neither a stolen vehicle nor a consent to search.

tioner Machi seems to suggest (Pet. 6-7) that his possessory interest in the bag is sufficiently shown by the fact that he had been riding earlier in the same stolen van that contained the bag. In any case, a mere possessory interest in a searched item does not establish a right to challenge its search. United States v. Salvucci, supra, slip op. 8. Even assuming that they had a possessory interest in the bag, it is apparent that petitioners have no basis for objecting to the search.

A defendant may object to a search as a violation of the Fourth Amendment only when the search violates his legitimate expectation of privacy (Rakas v. Illinois, 439 U.S. 128, 139-140 (1978)) or one that "society is prepared to recognize as 'reasonable,'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This Court has accordingly indicated its approval of the rule that a person present in a stolen automobile may not challenge a search of that automobile because he has no legitimate expectation of privacy in it. Rakas v. Illinois, supra, 439 U.S. at 141 n.9. See, e.g., United States ex rel. Laws v. Yeager, 448 F.2d 74, 85 (3d Cir. 1971), cert. denied, 405 U.S. 976 (1972); Williams v. United States, 323 F.2d 90, 95 (10th Cir. 1963).

It is similarly true that a person retains no legitimate expectation of privacy in an unlocked duffle bag when he places it in a stolen car. Here, petitioners clearly abandoned their privacy interest in the contents of the bag when they placed it in the stolen vehicle. They assumed the risk that the vehicle would be restored to its rightful owner, in which case the owner would surely have examined its contents, including that of the unlocked bag. Petitioners could also expect that the owner of the van would permit the authorities to search the van. See Government of Virgin Islands v. Gereau, 502 F.2d 914, 926-927 (3d Cir. 1974), cert. denied, 421 U.S. 1001 (1975). Even without the consent of the owner, a stolen vehicle is subject to an inventory

search when recovered by the police. South Dakota v. Opperman, 428 U.S. 364 (1976). The situation here is analogous to one in which a person leaves his belongings in the custody of a third party; he assumes the risk that the third party will examine those belongings or consent to an examination by someone else. See Rawlings v. Kentucky, No. 79-5146 (June 25, 1980), slip op. 6. As in Rawlings, petitioners took no special precautions to protect their privacy interest; they did not even lock the bag. Accordingly, petitioners may not object to the search of the bag.4/

2. Petitioners contend (80-5484 Pet. 15-18; 80-5491 Pet. 5-9) that the district court erred in failing to require the government to disclose the address of Eugene Mercier, a participant in the conspiracy. This contention is without merit.

After the government rested its case, petitioners asked for Mercier's address on the ground that he was a "material witness." There was also a suggestion that Mercier might have been an FBI informant (Tr. 431-432). The government, however, refused to divulge anything about Mercier, not even whether it had his address. The district court observed (Tr. 433-435) that petitioner Blum knew Mercier "very well" as reflected by co-conspirator McCarthy's testimony that they, along with petitioner Machi, had "met together * * * at least six or seven times in the alleged planning of this robbery," and that there was "no evidence * * * whatsoever that [Mercier] was [involved in the scheme as] a Government agent." The court also pointed out (Tr. 434) that "Mercier probably doesn't want to be subpoenaed, probably can't be found and if he was subpoenaed * * * chances are he'd claim his privilege against self-incrimination." Nonetheless, the court ruled that it would require the government to disclose

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4/ Cf. United States v. Ochs, 595 F.2d 1247, 1253 (2d Cir. 1979) (the defendant could challenge the search of a briefcase found in a car he had borrowed because he was legitimately in possession of the car and entitled to exclude others from it).

Mercier's last known address, absent a showing that Mercier "must be protected for security reasons" (Tr. 435). The government requested an opportunity to make a presentation concerning that matter in chambers and out of the presence of the defense. After an in camera presentation by the government,[5/] the district court denied the motion for disclosure of Mercier's address "based upon the representations of the [government]" (Tr. 439).

Petitioners' argument that disclosure of Mercier's address was compelled under this Court's decision in Roviaro v. United States, 353 U.S. 53 (1957), is meritless. Roviaro recognizes a governmental privilege not to reveal the identity of informants who give it information concerning violations of the law. At the same time, however, the Court recognized in Roviaro that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way" (id. at 60-61; footnote omitted). On the facts of Roviaro, the balance between "the public interest in protecting the flow of information [and] the individual's right to prepare his defense" fell on the side of disclosure. Id. at 62. The Court nevertheless reaffirmed that "public policy forbids disclosure of an informant's identity unless essential to the defense." Id. at 61 n.9, quoting Scher v. United States, 305 U.S. 251, 254 (1938).

The balancing test called for in Roviaro does not apply in this case, because there was no doubt that petitioners were aware of Mercier's identity. As the district court observed (Tr. 433, 436-437), petitioners knew Mercier "very well." Roviaro requires the government, under certain circumstances, to reveal an informant's identity; it does not require it to assist in producing him at trial. See, e.g., United States v. Powers, 572

5/ The transcript of the in camera presentation was placed under seal by the district court.

F.2d 146, 153 (8th Cir. 1978); United States v. Fuentes, 563 F.2d 527, 534 (2d Cir.), cert. denied, 434 U.S. 959 (1977). In any event, this is not a case like Roviaro, where the "'informer was the sole participant, other than the accused, in the transaction charged'" and his testimony would have been "highly relevant." 353 U.S. at 63-64; see McCray v. Illinois, 386 U.S. 300, 310-311 (1967). There is no suggestion in the record that Mercier would have cast any doubt on co-conspirator McCarthy's testimony, which was closely corroborated by the evidence gleaned from the FBI's surveillance operations. And as the district court observed (Tr. 434-435), there was no evidence of entrapment here. Indeed, the lack of importance of Mercier to the defense is underscored by the fact that petitioners made no effort to locate him prior to trial even though he had participated in the scheme and was well known to them. Thus, petitioners have made no showing that the district court abused its discretion in denying petitioners' motion for disclosure of Mercier's address.6/

3. Petitioner Blum contends (Pet. 18-19) that the district court erred by instructing the jury that a defendant does not escape criminal liability for conspiracy if he withdraws from a conspiracy after an overt act had been committed. This contention is without merit.

The general rule of abandonment of conspiracy is that "a defendant is not punishable as a member of the conspiracy if he withdraws before an overt act is committed." United States v. Heckman, 479 F.2d 726, 729 (3d Cir. 1973). See also United States v. Monroe, 552 F.2d 860, 864-865 (9th Cir.), cert. denied,

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6/ There is similarly no substance to petitioner Blum's claim (Pet. 18) that the district court erred in permitting the government to make an in camera presentation concerning Mercier. An in camera examination is an appropriate means of resolving the dilemma facing a court when it "'must determine whether the circumstances are appropriate for the claim of privilege * * * without forcing disclosure of the very thing the privilege is designed to protect.'" See Black v. Sheraton Corporation of America, 564 F.2d 550, 553 (D.C. Cir. 1977), quoting United States v. Reynolds, 345 U.S. 1, 8 (1953).

431 U.S. 972 (1977). Once an overt act has been committed, withdrawal from the conspiracy may still be relevant for purposes of measuring the statute of limitations (see United States v. United States Gypsum Co., 550 F.2d 115, 129-130 (3d Cir. 1977), aff'd, 438 U.S. 422 (1978)), or determining the admissibility of statements made by co-conspirators, see United States v. Mardian, 546 F.2d 973, 978 n.5 (D.C. Cir. 1976). But a conspirator cannot erase a completed conspiracy offense by withdrawing after all the elements of an offense under 18 U.S.C. 371 have been committed. See, e.g., United States v. Monroe, supra, 552 F.2d at 864.

Moreover, even if the charge on withdrawal was erroneous, it is clear petitioner Blum was not prejudiced thereby. Once a defendant's participation in a conspiracy or other continuing illegal act is shown, his participation is presumed to continue throughout the period of unlawful activity unless he produces affirmative evidence of withdrawal. See, e.g., Hyde v. United States, 225 U.S. 347, 369 (1912); United States v. Gillen, 599 F.2d 541, 548 (3d Cir.), cert. denied, 444 U.S. 866 (1979). Mere cessation of activity in furtherance of the illegal activity is not enough to establish withdrawal. Rather, withdrawal must be demonstrated by affirmative acts inconsistent with the objects of the conspiracy that disavow or defeat the conspiratorial purposes, and these acts must be communicated either in a manner reasonably calculated to reach co-conspirators or by making full disclosure to the authorities. The defendant bears the burden of demonstrating such affirmative acts. See, e.g., United States v. United States Gypsum Co., 438 U.S. 422, 464-465 (1978); Hyde v. United States, supra, 225 U.S. at 369; United States v. Gillen, supra, 599 F.2d at 548; United States v. Wentland, 582 F.2d 1022, 1025-1026 (5th Cir. 1978), cert. denied, 439 U.S. 1133 (1979); United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965).

Petitioner Blum was arrested with the other conspirators on the day of the planned robbery in the vicinity of the armored car and in possession of the vehicles that had been stolen for use in the robbery, which contained weapons and other instrumentalities of the crime. The robbery had not been committed that day because the armored car was not parked where the conspirators had hoped, and the evidence at trial indicated that they had decided only to postpone the robbery until the following week (Tr. 120-121). Thus, the record in this case offers no support for the contention that petitioner Blum had abandoned or withdrawn from the conspiracy.

4. As petitioner Blum points out (Pet. 20), to sustain a conviction for carrying firearms during a felony under 18 U.S.C. 924(c) the government must prove that the separate act of carrying the firearms involved constituted a distinct violation of law. See United States v. Elorduy, 612 F.2d 986, 990 (5th Cir. 1980). Petitioner Blum contends (Pet. 19-20) that he was improperly convicted under Section 924(c) because the government failed to prove that he was not licensed to carry a firearm in Pennsylvania. This claim is groundless.

It is true that the state trooper who conducted the search of Pennsylvania records, which are indexed according to name and date of birth (Tr. 410), did not use petitioner's correct date of birth, and he testified that this error possibly could have affected the validity of the search that concluded that petitioner Blum had not been issued a license in Pennsylvania. However, independent evidence showed that petitioner Blum was not licensed to carry any firearms by either the City of Pittsburgh or Allegheny County (Tr. 383-384, 389). Co-conspirator McCarthy, the owner of the weapons, who conceded that he was not registered to carry them (Tr. 194), was a resident of Allegheny County. Petitioner Blum was a resident of the State of Ohio. Thus, petitioner Blum's argument rests on the theoretical, but highly

unlikely, possibility that he was registered to carry handguns belonging to McCarthy by a state in which he did not live and by a county in which neither he nor McCarthy lived. The evidence introduced by the government was sufficient to sustain its burden under Section 924(c) and, in light of the fact that Blum did not represent that he was registered to carry the handguns (see Tr. 418), to support the jury's verdict.7/

5. Petitioner Blum also contends (Pet. 14) that the FBI lacked probable cause to arrest him. This contention is without merit.

It is true that the FBI did not recognize Blum from their earlier surveillance. However, it was known from the beginning of the investigation that four principals were involved in the robbery scheme (S. Tr. 44). Thus, when four men, including Blum, arrived in the vicinity of the armored truck on the day the robbery was to occur in two vehicles that had been stolen for use in the robbery, there was clearly probable cause to believe that all four men were involved in the conspiracy. Moreover, when the agents announced their identity, petitioner Blum attempted to escape by jumping over a fence (S. Tr. 75).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1980

7/ When the mistake in the birth date came to light, the government offered to recheck the records. The court declined to hold up the trial for this purpose, noting that Blum was not representing that he had a license and that the evidence was sufficient to show that he did not have one (Tr. 418-419).

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